Military Law Review

AMERICAN MILITARY LAW IN THE LIGHT OF THE FIRST MUTINY ACT'S TRICENTENNIAL
Colonel Frederick Bernays Wiener, AUS (Retired)

THE SIXTH ANNUAL WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW: TERRORISM, THE LAW, AND THE NATIONAL DEFENSE
Abraham D. Sofaer

THE CULTURE OF CHANGE IN MILITARY LAW
Eugene R. Fidell

ANDREW JACKSON, MARTIAL LAW, CIVILIAN CONTROL OF THE MILITARY, AND AMERICAN POLITICS: AN INTRIGUING AMALGAM
Jonathan Lurie

INSTRUCTIONS AND ADVOCACY
Major Michael D. Warren and Lieutenant Colonel W. Gary Jewell

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MILITARY LAW REVIEW

TABLE OF CONTENTS

Title	*Page*
Thesis Topics of the 37th Judge Advocate Officer Graduate Course	v
American Military Law in the Light of the First Mutiny Act's Tricentennial Colonel Frederick Bernays Wiener, AUS (Retired)	1
The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense Abraham D. Sofaer	89
The Culture of Change in Military Law Eugene R. Fidell	125
Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam Jonathan Lurie	133
Instructions and Advocacy Major Michael D. Warren and Lieutenant Colonel W. Gary Jewell	147

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Footnotes also must be typed double-spaced and should appear as a separate appendix at the end of the text. Footnotes should be numbered consecutively from the beginning to end of a writing, not chapter by chapter. Citations should conform to the *Uniform System of Citation* (14th ed. 1986), copyrighted by the *Columbia, Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to *Military Citation* (TJAGSA 4th ed. 1988) (available through the Defense Technical Information Center, ordering number AD B124193). Masculine pronouns appearing in the text will refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of grade or other title, present and immediate past positions or duty assignments, all degrees, with names of granting schools and years received, bar admissions, and previous publications. If the article was a speech or was prepared in partial fulfillment of degree requirements, the author should include date and place of delivery of the speech or the source of the degree.

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When a writing is accepted for publication, a copy of the edited manuscript will generally be provided to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author. Because of contract limitations, neither galley proofs nor page proofs are provided to authors.

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THESIS TOPICS OF THE 37TH JUDGE ADVOCATE OFFICER GRADUATE COURSE

Nine students from the 37th Judge Advocate Officer Graduate Course, which graduated in May 1989, participated in the Thesis Program. The Thesis Program is an optional part of the LL.M. curriculum. It provides students an opportunity to exercise and to improve analytical, research, and writing skills and, equally important, to produce publishable articles that will contribute materially to the military legal community.

All graduate course theses, including those of the 37th Graduate Course, are available for reading in the library of The Judge Advocate General's School. They are excellent research sources. In addition, many are published in the *Military Law Review.*

The following is a listing, by author and title, of the theses of the 37th Judge Advocate Officer Graduate Course:

Major David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty.*

Captain Dean C. Berry, *Disparate Impact Analysis After Watson v. Fort Worth National Bank.*

Captain Richard A. Hatch, *Waging the War on Illegal Drugs in the Workplace: The Army Civilian Drug Abuse Testing Program—A Legal Weapon?*

Captain Carlton L. Jackson, *Pretrial Agreements in the Military: Past and Future.*

Captain Eva M. Novak, *Private Organizations and the New AR 210-1.*

Captain Fred T. Pribble, *A Comprehensive Look at the North Atlantic Treaty Organization Mutual Support Act of 1979.*

Captain Margaret O. Steinbeck, *Liability of Defense Contractors for Hazardous Waste Cleanup Costs.*

Captain Jeffrey A. Stonerock, *The Advocate-Witness Rule: Anachronism or Necessary Restraint?*

Captain Annamary Sullivan, *The President's Authority to Promulgate Death Penalty Standards.*

AMERICAN MILITARY LAW IN THE LIGHT OF THE FIRST MUTINY ACT'S TRICENTENNIAL*

by Colonel Frederick Bernays Wiener, AUS (Retired)**

Why do we celebrate an old English statute in Charlottesville, Virginia, the home of the man who articulated in the Declaration of Independence the reasons why the United States of America should no longer be subject to English sovereignty?

Why does the institution that trains the United States Army's lawyers observe the enactment of English legislation that neither initiated courts-martial there nor first regulated their proceedings, and which for over a century has never reappeared on the English statute book?

What, then, is the significance of England's First Mutiny Act, a measure that became effective on April 12, 1689, just three hundred years ago today, to American military law and to American history generally?

Those are the questions that I shall be addressing in this article.

I. THE FIRST MUTINY ACT IN ITS SETTING

We encounter the first manifestation of military law in England soon after the appearance of the first text explaining the then recently formulated English common law. That text, known as *Glanvill*, was composed around 1189.[1] But not very long after that, during the Yorkshire eyre of 1218-1219, it was recorded that Serlo, charged with maiming Thomas, "denies definitely that Thomas was ever maimed through him, on the contrary he lost his hand in the war by judg-

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*This article is an expansion of an address delivered at The Judge Advocate General's School, Charlottesville, Virginia, on April 12, 1989, the 300th anniversary of the First Mutiny Act.

Needless to say, all opinions expressed are personal to the writer, who, however, wishes to acknowledge the invaluable assistance extended during the preparation of this paper by LTC Timothy E. Naccarato and MAJ Patrick W. Lisowski, both of the faculty of The Judge Advocate General's School; by MAJ Alan D. Chute, Editor of the *Military Law Review*; and by James Stuart-Smith, Esq., C.B., Q.C., The Judge Advocate General of the Forces in Great Britain.

**Ph.B., Brown Univ., 1927; LL.B., Harvard Univ., 1930; LL.D., Cleveland-Marshall Law School, 1969. His writings include Briefing and Arguing Federal Appeals (1961), Civilians Under Military Justice (1967), and many other publications on legal, military, and historical subjects.

[1]Tractatus de legibus et consuetudinibus regni Angliae qui Glanvilla vocatur, at xxx-xxxi (G.D.G. Hall ed. 1965).

ment of the marshal of the army for a cow which he stole in a churchyard."[2]

Skipping to the sixteenth century[3], we know that, as has recently been demonstrated, a host of military books were then published in England.[4] During the reign of the first Queen Elizabeth, her troops in the Low Countries were attended by a clergyman and member of Doctors' Commons who served as their "iudge Martiall." This worthy published in 1593 a text on the functions of that office, which espoused as the preferred method of pretrial procedure "where presumptions are sufficient, and the matter heinous," examination "by racke or other paine."[5] Thus Dr. Matthew Sutcliffe, some time Archdeacon of Taunton, Dean of Exeter, and Provost of the "College at Chelsey," stands as the first in a long line of those who today are colloquially characterized as "iron-pants judge advocates."[6]

The laws of war remained in the civilians' sphere for centuries, and in the English Civil War members of Doctors' Commons served as judge advocates both in the Parliamentary Army and in the King's,[7] while both forces were governed by very similar Articles of War.[8] After hostilities ceased, and the Commonwealth and Protectorate were followed by the Restoration, the standing army was limited to garrisons and the King's guards.[9] But the 1628 Petition of Right had declared that military law (then called martial law) was not permitted in time of peace, when the King's courts were open for all persons to receive justice according to the laws of the land.[10] Thus courts-martial of even undoubted soldiers were deemed illegal. Consequently, mutiny in time of peace was considered cognizant only by a com-

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[2]Rolls of the Justices in Eyre for Yorkshire, 1218-19, at 310-11 (D.M. Stenton ed. 1937; Selden Soc., vol. 56) No. 851.

[3]For material on military law during the intervening period, see 6 W. Holdsworth, A History of English Law 225-30 (1924); Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. Rev. 478, 479-81 (1969) and Mil. L. Rev. Bicent. Issue 25, 26-28 (1975); Dean, *The History of Military and Martial Law*, in R. Higham, ed., A Guide to the Sources of British Military History 613 (1972).

[4]Hagan, *Overlooked Textbooks Jettison Some Durable Military Law Legends*, 113 Mil. L. Rev. 163 (1986).

[5]M. Sutcliffe, The Practice, Proceedings, and Lawes of Armes 340 (1593).

[6]19 Dict. Nat. Biog. 175.

[7]F. Wiener, Civilians Under Military Justice 166 (1967) (and references there cited) [hereinafter Civilians].

[8]1 C. Clode, The Military Forces of the Crown 429-40 (1869) (Royal "Lawes and Ordinances of Warre"); *id.* at 442-45 (parliamentary provisions) [hereinafter Clode, M.F.].

[9]1 Clode, M.F., *supra* note 8, at 52-54; C. Clode, Administration of Justice under Military and Martial Law 12-13 (2d ed. 1874) [hereinafter Clode, M.L.].

[10]3 Car. I ch. 1, 5 Stat. Realm 24; 1 Bl. Comm. *400; 1 Clode; M.F., *supra* note 8, at 424; 1 W. Holdsworth, *supra* note 3, at 576; 6 *id.* at 228-30.

mission of oyer and terminer,[11] while desertion, despite some contemporary doubts, was in fact treated as a common law felony without benefit of clergy that was triable by a jury and before the judges of the common law.[12]

In 1688 William of Orange was invited to England after the conduct of his father-in-law James II had become intolerable.[13] The Glorious Revolution of the year was a virtually bloodless event. But soon after William and Mary were recognized as the new King and Queen, a Scots regiment of James's army, led by Lord Dumbarton, refused to follow the new monarchs' orders, declaring James to be their King.[14] Prompt action was necessary, and Parliament responded with the Mutiny Act of 1689, passed on March 28th and effective on April 12th.[15]

The preamble to this measure, the Tricentennial of which we celebrate today, sets forth the dilemma then facing English lawmakers.

> And whereas noe Man may be forejudged of Life or Limbe or subjected to any kinde of punishment by Martiall Law, or in any other manner than by the Judgement of his Peeres and according to the knowne and Established Laws of this Realme. Yet nevertheless it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment then the usuall Forms of Law will allow:

With the passage of this Act of ten sections, which was to be in force for only six months, the constitutional as distinguished from the institutional history of the British Army begins.[16] There was no

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[11]1 Clode, M.F., *supra* note 8, at 440, 441.

[12]King v. Dale, 2 Show. 511 (1687); same case *sub. nom.* King v. Beal, 3 Mod. 124; 1 Bl. Comm. *402; 6 W. Holdsworth, *supra* note 3, at 227-30.

[13]*E.g.*, D. Ogg, England in the Reigns of James II and William III, chs. VII and VIII (1955).

[14]*Id.* at 230-31; 3 Lord Macaulay's History of England, at 1346-53 (C. Firth ed. 1914); Clode, M.F., *supra* note 8, at 142-43. Documents relating to this mutiny are at Clode, M.F., *supra* note 8, at 497-99.

[15]1 Will. & M. ch. 5, 6 Stat. Realm 55. Its text is also at 1 Clode, M.F., *supra* note 8, at 499-501, and, much more conveniently for American readers, in W. Winthrop, Military Law and Precedents *1446 (2d ed. 1896) (Star pages indicate the pagination of the original rather than that of the 1920 reprint.).

[16]1 W. Holdsworth, *supra* note 3, at 577; 6 *id.* at 241; 10 *id.* at 378; 1 Clode, M.F., *supra* note 8, at iv; C. Walton, History of the British Standing Army 529, 531, 534 (1894).

watershed dividing old and new procedures. To the contrary, the form of court-martial proceedings prior to 1689 differed hardly at all from those conducted later.[17] But henceforward there could be no doubt of the legality of such trials.

At first the periodic renewal of the Mutiny Act regularly encountered, in view of its origin, articulate opposition from the Jacobites.[18] But in due course, as Maitland wrote a century ago, "[i]t becomes always clearer that there must be a standing army and that a standing army could only be kept together by more stringent rules and more summary procedure than those of the ordinary law and the ordinary courts."[19]

The Mutiny Act still needed to be renewed every year, however. At first this was because the memories of Cromwell's Army were still vivid; this was the force that had overshadowed Parliament,[20] and whose major-generals had supervised local government.[21] After the Glorious Revolution and the Act of Settlement, those memories faded into mere recitals, developing, however, into a continuing convention of British public law that required the Army to be legitimated annually, or, in Blackstone's words, "the annual expedience of a standing army."[22]

The last Mutiny Act, passed in 1879, contained 110 sections, and the last Articles of War numbered no less than 187.[23] Yet every company commander was required to familiarize himself with the details of both. In that year, Act and Articles were combined into a single piece of legislation.[24] But, to ensure compliance with what then had become a constitutional tenet, that permanent enactment needed to be brought into operation annually by another Act of Parliament.[25] Thus, once more to quote Maitland, "the principle is still preserved

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[17]Clode, M.L., *supra* note 9, at § 12 (1st ed. 1872). See, for the earlier practice, Clode, M.L., *supra* note 9, at ch. I (2d ed. 1874); C. Walton, *supra* note 16, at 535 and ch. XXVI; C. Cruickshank, Elizabeth's Army (2d ed. 1966); C. Firth, Cromwell's Army (4th ed. 1962).

[18]Clode, M.L., *supra* note 9, at 19; 1 Clode, M.F., *supra* note 8, at 151-53; 2 J. Fortescue, A History of the British Army (1899-1930) 18-20, 261, 562.

[19] F. Maitland, The Constitutional History of England 325 (1908) (posthumous publication of a series of lectures actually delivered in 1888).

[20] *E.g.*, G. Davies, The Early Stuarts, 1603-1660, at ch. X (2d ed. 1959).

[21]*Id.* at 179-80, 182, 306; C. Hill, The Century of Revolution 1603-1714, at 115-17, 136-39, 189-90 (1961).

[22]4 Bl. Comm. *434.

[23]41 Vict. ch. 10, 42 Vict. ch. 4; *see* Civilians, *supra* note 7, at 215.

[24]Civilians, *supra* note 7, at 215-16, 231.

[25]*Id.* at 215-16, 235-37.

that the army shall be legalized only from year to year."[26]

Indeed, it was not until 1955 that the British Army could be legitimated for five years at a time.[27] At the moment, under the provisions of sections 1(3) and 1(4) of the Armed Forces Act 1986, such legitimation may be extended to the end of the year 1991 by Orders in Council, the drafts of which have been approved by resolutions of each House of Parliament.[28]

II. THE BEGINNINGS OF AMERICAN MILITARY LAW

It is now time to cross the Atlantic and to turn to 1775, the year of Lexington, Concord, and Bunker Hill, the year when the Continental Congress selected George Washington to command "the forces raised or to be raised for the defense of American liberty,"[29] the year when William Tudor became the first "Judge Advocate of the Army."[30]

Let it always be remembered, as we approach this part of the narrative, that the leaders of the American Revolution were really not very revolutionary after all. To begin with, they retained the English language. Unlike the Irish Free State a century and a half later, they did not mark their new found freedom by opting for Gaelic. Nor did they seek to substitute any other language for their mother tongue. Next, they retained the common law. Not until Louisiana was acquired by treaty in 1803 was there ever any vestige of civil law on American soil, nor until the Southwest was taken from Mexico in 1848 was the doctrine of community property recognized anywhere in the United States. Third, they retained the English system of representative government, one that continues nationally as well as in all of today's fifty states. And, finally, they adopted virtually verbatim the British system of military law.

Americans had become acquainted with the British system in the course of the four colonial wars against the French. Washington himself, while Colonel of the First Virginia Regiment, had presided

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[26]F. Maitland, *supra* note 19, at 448.
[27]Civilians, *supra* note 7, at 235-37.
[28]1986 ch. 21.
[29]2 J. Cont. Cong. 91; 3 D. Freeman, George Washington 434-37 (1951). Photographs of the *Journals* showing the original congressional resolution appear at the latter pages.
[30]2 J. Cont. Cong. 221 (July 29, 1775).

over at least one general court-martial,[31] and as commanding officer of that unit had meted out what today would be deemed extremely harsh discipline. His deserters were hanged in preference to being shot, on the view that hemp carried a sterner warning than lead.[32]

Within a fortnight after making Washington their general, Congress enacted a set of Articles of War.[33] But after some experience under that code, Washington considered that legislation insufficient and urged adoption of a more drastic code.[34] Accordingly, Congress referred the problem to a committee of five, of which John Adams and Thomas Jefferson were members.[35] Here is how Adams later recalled the Committee's work:

> It was a very difficult and unpopular Subject: and I observed to Jefferson, that Whatever Alteration We should report with the least Ennergy in it, or the least tendency to a necessary discipline of the Army, would be opposed with as much Vehemence as if it were the most perfect: We might as well therefore report a compleat System at once and let it meet its fate. Some thing perhaps might be gained. There was extant one System of Articles of War, which had carried two Empires to the head of Mankind, the Roman And the British: for the British Articles of War were only a litteral Translation of the Roman: it would be in vain for Us to seek, in our own Inventions or the Records of Warlike nations for a more compleat System of military discipline: it was an Observation founded in undoubted facts that the Prosperity of Nations had been in proportion to the discipline of their forces by Sea and Land: I was therefore for reporting the British Articles of War, totidem Verbis. Jefferson in those days never failed to agree with me, in every Thing of a political nature, and he very cordially agreed in this. The British Articles of War were Accordingly reported and defended in Congress, by me Assisted by some others, and finally carried.[36]

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[31]Civilians, *supra* note 7, at 32 (citing an entry in the Court-Martial Books that are included in the War Office papers now preserved in Britain's Public Record Office, WO 71/66/450).

[32]2 D. Freeman, *supra* note 29, at 259.

[33]2 J. Cont. Cong. 111; W. Winthrop, *supra* note 15, at *1478.

[34]". . . a Letter from General Washington, sent by Colonel Tudor, Judge Advocate General, representing the Insufficiency of the Articles of War and requesting a Revision of them." 3 Diary and Autobiography of John Adams 409 (L.H. Butterfield ed. 1961) [hereinafter "Adams D & A"].

[35]5 J. Cont. Cong. 442. The other members were John Rutledge, James Wilson, and R. R. Livingston.

[36]3 Adams D & A, *supra* note 34, at 409-10.

A little later in his *Autobiography*, however, Adams intimated that persuading Congress to agree had been a one-man enterprise:

> In Congress Jefferson never spoke, and all the labour of the debate on these Articles, Paragraph by Paragraph, was thrown upon me, and such was the Opposition, and so indigested were the notions of Liberty prevalent among the Majority of the Members most zealously attached to the public Cause, that to this day I scarcely know how it was possible that these Articles could be carried. They were Adopted however . . . .[37]

With only a very few amendments, those Continental Articles of War remained in force throughout the war.[38]

It was only after the peace that their rigid requirement of not less than thirteen officers to constitute a general court-martial became unworkable. That was because, following demobilization, the minuscule Army that Congress was willing to retain had great difficulty in assembling that many officers in any one place.[39] The need

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[37] *Id.* at 434. For the text of the 1776 Articles of War see 5 J. Cont. Cong. 788; and W. Winthrop, *supra* note 15, at *1489.

W. Winthrop, *supra* note 15, at *1448 prints the "British Articles of War of 1765, in Force at the Beginning of Our Revolutionary War." Actually, however, the British practice at the time was to promulgate each year new Articles of War under the King's sign manual to conform to the annual Mutiny Act of the particular year. General G.B. Davis, a former TJAG, established convincingly that the American Articles of both 1775 and 1776 were taken from the British set for 1774. G. Davis, Military Law of the United States 340-41 (3d ed. 1913).

It would not have been difficult for any interested individual resident in Boston in 1774 and prior to the siege of that town after Lexington and Concord in April 1775 to have obtained a set of the current British Articles of War. Contrariwise, those for 1765 would have been hard to come by, inasmuch as British troops were not permanently stationed in Boston prior to 1768. *See* L. Gipson, The Coming of the Revolution 189-91 (1954) (and see illustration No. 11 following p. 144).

[38] *E.g.*, Res. of Nov. 16, 1779, 15 J. Cont. Cong. 1277, 1278.

[39] E. Coffman, The Old Army 1784-1898, at 24 (1986); first preamble to the 1786 amendments, 30 J. Cont. Cong. 316, W. Winthrop, *supra* note 15, at *1504.

That first preamble copies the committee report made to Congress in consequence of an incident that occurred in January 1786 at Fort McIntosh, a station in Pennsylvania 29 miles from Pittsburgh at the mouth of Beaver Creek. Two deserters there had been sentenced to death, following which three more soldiers deserted. When apprehended, they were tried by a general court-martial of less than 13 members and sentenced to death, after which those sentences were ordered executed by the commanding officer, Major John P. Wyllys. When the news reached Secretary at War Knox, this officer was suspended from duty and placed in arrest. The committee report, by Arthur St. Clair, Henry Lee, and John Lawrence, in consequence recommended eliminating the 13-member requirement from the Articles of War.

Subsequently a court of inquiry cleared Major Wyllys because "the crime of desertion, has infected the troops at Fort McIntosh in such a manner as to threaten the total dissolution of the garrison," a condition little short of mutiny. Secretary Knox

for a membership of thirteen went back to at least 1666,[40] it was inferentially retained in the First Mutiny Act,[41] and it was specifically set forth in every later set of Articles of War, both English and American.[42] Why thirteen? So far as anyone can tell, that number derived from the supposed analogy of a common law criminal trial before a judge and twelve jurymen.[43] As a matter of necessity, however, Congress in 1786 relaxed the minimum number for a general court to five, but with the admonition that this tribunal "shall not consist of less than 13, where that number can be convened without manifest injury to the service."[44]

When the Constitution became operative in 1789 and Secretary at War Knox had become Secretary of War, he advised Congress that the existing Articles needed to be "revised and adapted to the constitution."[45] But all that was forthcoming from Congress were reenactments by reference that included the generalized caution, "as far as the same may be applicable to the constitution of the United States."[46] Not until 1806 did Congress adopt a new set of Articles of War.

The legislative history of that new military code was discussed in detail some thirty years ago.[47] But more recent research in hitherto unprinted manuscripts has disclosed that it was President Jefferson who pushed the new enactment, in order to enhance his control over the Army, many officers of which had been reported to be "non-Jeffersonian."[48]

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therefore concluded that "Major Wyllys not being criminal in a military point of view," he should be released from arrest. Congress agreed. But four years later Major Wyllys was killed when General Harmar's force was defeated by the Indians on October 22, 1790, at the confluence of the St. Josephs and St. Marys rivers in Ohio. *See* 30 J. Cont. Cong. 119-21, 145-46, 433-35, 485; F. Heitman, Historical Register and Dictionary of the United States Army (1903) (both volumes) (subsequent citations refer only to first volume).

[40]1 Clode, M.F., *supra* note 8, at 447, No. 2

[41]1 Clode, M.F., *supra* note 8, § 10, at 500; W. Winthrop, *supra* note 15, at *1447.

[42]*E.g.*, British Articles of War of 1765, arts. I and II, § XV; W. Winthrop, *supra* note 15, at *1462; Continental Articles of War of 1775 art. XXXIII, W. Winthrop, *supra* note 15, at *1482; Continental Articles of War of 1776, art. 1, § XIV, W. Winthrop, *supra* note 15, at *1498.

[43]Clode, M.L., *supra* note 9, at 120; W. Winthrop, *supra* note 15, at *99.

[44]Art. 1, § XIV of the 1786 amendments, 30 J. Cont. Cong. 316, W. Winthrop, *supra* note 15, at *1504.

[45]1 Am. St. Pap. Mil. Aff. 6 (1832).

[46]Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121; Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432; Act of May 30, 1796, ch. 39, § 20, 1 Stat. 486.

[47]Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 1, 15-22 (1958), *reprinted in* Mil. L. Rev. Bicent. Issue 171, 183-88 (1975) [hereinafter C-M & B/R].

[48]T. Crackel, Mr. Jefferson's Army 85-87 (1987).

Two years and three sessions of the Congress were to pass before enactment of the new Articles. Perhaps the issue most contested as that measure was debated was whether the President's power to regulate the Army's uniform should extend to its members' manner of wearing their hair and, if so, whether the militia's hair might be similarly regulated. That controversy was an echo of the fate of Colonel Thomas Butler, a Revolutionary veteran who had been twice tried and twice convicted of disobeying General Wilkinson's order to cut off all queues.[49]

Far more vital, however, was the circumstance that, for the most part, the 1806 Articles simply carried forward those enacted in 1776 and 1786, but with the individual articles, which formerly had been separated into sections, now numbered consecutively.[50] In addition, the later compilation received the benefit of clarifying language framed by Senator John Quincy Adams of Massachusetts, in order to correct what he regarded as a "continual series of the most barbarous English that ever crept through the bars of legislation."[51]

The new, renumbered, and somewhat clarified Articles of War were approved by President Jefferson on April 10, 1806.[52] Except for a few amendments, about to be discussed, they were carried in 1874 into section 1342 of the Revised Statutes, a process that in no sense involved their revision.[53] And in that final form they remained in force until March 1, 1917, when the 1916 Articles of War took effect.[54]

Consequently it is fair to say that most of what John Adams and Thomas Jefferson took from the contemporaneous British Articles of War into their own 1776 draft, and which Jefferson as President approved in 1806, constituted the code that governed the armies of the United States for just 40 days short of 111 years.

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[49]C-M & B/R, *supra* note 47, 72 Harv. L. Rev. at 18-19, 21; Mil. L. Rev. Bicent. Issue at 183-88; T. Crackel, *supra* note 48, at 86-87, 113, 116-20; Hickey, *Andrew Jackson and the Army Haircut: Individual Rights vs. Military Discipline*, 35 Tenn. Hist. Q. 365 (1976); Hickey, *The United States Army versus Long Hair: The Trials of Colonel Thomas Butler, 1801-1805*, Pa. Mag. Hist. & Biog. 462 (1977); Wiener, *The Case of the Colonel's Queue*, Army, Feb. 1973, at 38.

[50]C-M & B/R, *supra* note 47, 72 Harv. L. Rev. at 22 n. 160; Mil. L. Rev. Bicent. Issue at 188 n.160; Manual for Courts-Martial 1917 ix [hereinafter MCM, 1917].

[51]1 Memoirs of John Quincy Adams 338 (C.F. Adams ed. 1874).

[52]Act of April 10, 1806, ch. 20, 2 Stat. 359; W. Winthrop, *supra* note 15, at *1509.

[53]Brigadier General E.H. Crowder, TJAG, in Sen. Rep. No. 130, 64th Cong., 1st sess. 17, 27-28.

[54]Act of Aug. 29, 1916, ch. 418, § 4, 39 Stat. 619, 650, 670.

III. THE NINETEENTH CENTURY

Mr. Jefferson could not attend the Constitutional Convention of 1787; he was overseas at the time, serving as American Minister at the Court of France.[55] But from his residence in Paris he wrote to members of that Convention, warning against the dangers of standing armies.[56] That warning prompted George Mason of Virginia to withhold his own signature from the Constitution,[57] as that document plainly authorized a permanent military establishment.[58]

Having become President himself, Mr. Jefferson set about to reduce the army that he had inherited from the Federalists. A recent study, based on newly discovered documents, shows convincingly that "[f]or Jefferson and the more moderate Republicans, the events of 1798-1800 demonstrated not the necessity of dissolving the army, but the necessity of creating a Republican army—a military appendage loyal to the new regime."[59] Accordingly, the military peace establishment act of 1802[60] involved "a chaste reformation" of the Army,[61] which is to say dismissing voluble Federalist officers and incompetents of all stripes and thus leaving ample openings into which to appoint young Republicans.[62] In addition, Mr. Jefferson founded the U.S. Military Academy at West Point, in order to create an institution that "would prepare loyal young Republicans for commissioned service in his reformed army."[63]

Finally, the third President took a step that ran completely counter to orthodox Republican rhetoric. When the Whiskey Rebellion broke out in 1794, President Washington personally led the militia of four states against the rebels.[64] At that time Jefferson, no longer Secretary

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[55]2 D. Malone, Jefferson and His Time chs. I-VIII (1951).

[56]Letter Jefferson to Madison, Dec. 20, 1787, in 12 The Papers of Thomas Jefferson 438, 440 (Boyd ed. 1955); same to same, July 31, 1788, in 13 *id.* 440, 442, 443.

[57]2 M. Farrand, The Records of the Federal Convention 640 (1911).

[58]U.S. Const. art. I, § 8, cls. 12 and 13.

[59]T. Crackel, *supra* note 48, at 13.

[60]Act of March 16, 1802, ch. 9, 2 Stat. 132.

[61]Letter Jefferson to Nathaniel Macon, May 14, 1801, in 10 The Writings of Thomas Jefferson 261 (Bergh ed. 1907).

[62]T. Crackel, *supra* note 48, at ch. 2, and see particularly note 3 thereto at 193-94; E. Coffman, *supra* note 39, at 8-11. The evaluation of all 256 officers in the Army as of July 24, 1801, was made in coded remarks by Captain Meriweather Lewis, then President Jefferson's private secretary, and later the Lewis of the Lewis and Clark expedition.

[63]T. Crackel, *supra* note 48, at 62 and ch. 3.

[64]*Federal Aid in Domestic Disturbances*, Sen. Doc. No. 263, 67th Cong., 2d sess. 26-33 (1923); 7 D. Freeman, *supra* note 29, at ch. VII, esp. at 198-213.

For a new estimate of this incident, solidly based on manuscript evidence, see T. Slaughter, The Whiskey Rebellion (1986). The author's conclusions are generally anti-Federalist and may well be correct. But I cannot concur in his assertion (p. 225) that

of State, questioned the wisdom of "such an armament against people at their ploughs."[65] But when the Burr Conspiracy was unfolding during his own first presidential administration, he sought and obtained the Act of March 3, 1807, which for the first time authorized the employment of regular forces in domestic disturbances.[66]

As for the Articles of War that President Jefferson had approved in 1806, those were amended during the whole of the nineteenth century on a very limited and entirely ad hoc basis. Their first modification, in 1830, grew out of the trial of Colonel Roger Jones, then and for more than twenty years to come Adjutant General of the Army. Unfortunately, his views as to the contents of that year's *Army Register* were at variance with those of Major General Alexander Macomb, who was commanding the Army. In consequence, the latter preferred charges against Colonel Jones, appointed the court-martial to which those charges were referred, appeared before it as the sole prosecution witness, and on March 13, 1830, approved the proceedings that sentenced the accused to be reprimanded.[67] This was medicine too strong even for that day, so there followed, just eleven weeks later, an Act of Congress providing that, whenever the convening authority was the accuser, the court must be appointed by the President.[68]

The next amendment, enacted early in the Civil War on March 13, 1862, was an unnumbered Article of War that is never even mentioned in Colonel Winthrop's classic text on *Military Law and Precedents*. This was a provision, directed at military and naval officers alike, which made dismissal mandatory for anyone convicted

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"[h]istorian Charles Beard [An Economic Interpretation of the Constitution (1913)] was thus correct to assert connections between pecuniary self-interest and political action in post-Revolutionary America." On that point, I prefer the conclusion of Justice Holmes:

> Beard I thought years ago when I read him went into rather ignoble though most painstaking investigation of the investments of the leaders, with an innuendo even if disclaimed. I believe until compelled to think otherwise that they wanted to make a nation and invested (bet) on the belief that they would make one, not that they wanted a powerful government because they had invested.

Letter, O.W. Holmes to Sir F. Pollock, June 20, 1928, in 2 M. DeW. Howe, ed., Holmes-Pollock Letters 222-23 (1941).

[65]3 D. Malone, *supra* note 55, at 188.

[66]5 D. Malone, *supra* note 55, at 252-53; Act of March 3, 1807, ch. 39, 2 Stat. 443.

[67]W. Winthrop, *supra* note 15, at *72-*73, who cites War Dep't G.O. 9 of 1830. The entire record of Colonel Roger Jones's trial is contained in H.R. Doc. 104, 21st Cong., 1st sess. (1830), and reprinted in 4 Am. St. Pap. Mil. Aff. 450-79.

[68]Act of May 29, 1830, ch. 179, 4 Stat. 417.

by court-martial of returning fugitive slaves to their former owners.[69] With the passage of the thirteenth amendment outlawing slavery, that provision obviously became inoperative, as the area at which it was directed had ceased to exist. Thus, although never specifically repealed,[70] it does not appear with the other Articles of War in Revised Statutes § 1342. But, strangely enough, it still found its way into Revised Statutes § 1624 as article 18 of the Articles for the Government of the Navy![71]

Another individual instance in 1862 occasioned the next amendment to the military code. Brigadier General Charles P. Stone commanded the ill-fated October 1861 attack at Ball's Bluff near Leesburg, Virginia, which resulted in the death of Colonel Baker, a U.S. Senator from Oregon before the war.[72] (This was the engagement in which Captain Oliver Wendell Holmes, Jr., of the 20th Massachusetts received the first of his three war-time wounds.)[73] General Stone's lack of success on this occasion was attributed by the Committee on the Conduct of the War not to any military shortcomings on his part, but primarily to asserted pro-slavery utterances. He was therefore imprisoned at Fort Lafayette in New York harbor, for several months without either charges or trial.[74] To correct this inexcusable injustice, Congress on July 17, 1862, provided that, if an officer in arrest were not brought to trial within forty days following service of charges, he must be released from such arrest.[75] This set General Stone free, after 188 days of confinement. Yet he was never brought to trial.[76]

Two other items of Civil War military legislation must also be noted. In one, Congress for the first time made military personnel subject to trial by court-martial for major common law felonies, whether or not such offenses prejudiced good order or military discipline. This jurisdiction was limited to "time of war, insurrection, or rebellion,"

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[69]Act of March 13, 1862, ch. 40, 12 Stat. 354.

[70]The G.P.O.'s Index to the Federal Statutes (1933) does not list the foregoing Act as ever having been repealed.

[71]By the time of the first publication of the U.S. Code, *see* 34 U.S.C. § 1200 (1926), AGN 18 dealt with "Forfeiture of citizenship for deserters." But I have been unable to find any specific repeal of the Civil War prohibition against "Returning fugitives from service" that appears in R.S. § 1624 art. 18.

[72]J. McPherson, Battle Cry of Freedom 362-63 (1988); B. Catton, This Hallowed Ground 81-82 (1956).

[73]M. DeW. Howe, Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870, at 95-109 (1957).

[74]W. Winthrop, *supra* note 15, at *165-*166.

[75]Act of July 17, 1862, ch. 200, § 11, 12 Stat. 594, 595.

[76]Nor did he have much of a military career afterwards; *see* 18 Dict. Am. Biog. 72.

in recognition of the fact that, in the localities where the Union Army was then operating, all action of the civil courts was either suspended or else could not be promptly exercised.[77]

Also, in another Act passed a day earlier, Congress rendered punishable a whole series of frauds on the government, and included a recapture clause that purported to render military personnel subject to trial by court-martial for any of such frauds should they be discovered after the accused's separation from the service.[78] Colonel Winthrop deemed that clause unconstitutional and urged its repeal.[79] In fact, it was never stricken as long as the Articles of War remained in force.[80] But ninety-two years after the original enactment of that continuing jurisdiction provision, a similar stipulation was held invalid in the *Toth* case, which the Supreme Court decided in 1955 after two arguments on the issue.[81]

Following the end of Civil War hostilities, the Regular Army was steadily reduced in strength, until from 1875 through 1897 it never numbered more than 28,000 officers and men.[82] But, although over two million men had at some time seen active duty on the Union side, constituting nearly ten per cent of the entire population of the non-seceding states,[83] the close of the conflict was not marked by any outcry to rewrite or recast the system of military justice that had been in place since 1806. Why?

I venture to suggest that it was because throughout all of the war Regular officers were not competent to sit on courts-martial that tried volunteer officers or soldiers.[84] This circumstance meant that, whatever may have been the effect on discipline generally, the wartime officers and men accused of offenses were judged by neighbors who arrived at their findings and sentences with an appreciation of the accused's reputation and standing in his own community. And this circumstance meant that the citizen temporarily in uniform

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[77]Act of March 3, 1863, ch. 75, § 30, 12 Stat. 731, 736; AW 58 of 1874; W. Winthrop, *supra* note 15, at *1032-*1040.

[78]Act of March 2, 1863, ch. 67, §§ 1-2, 12 Stat. 696, 697; AW 60 of 1874.

[79]W. Winthrop, *supra* note 15, at *144-*46, *1201 ¶ 4.

[80]AW 94 of 1916, 1920, and 1948; Uniform Code of Military Justice art. 3(a), 10 U.S.C. § 803 (a) (1982) [hereinafter UCMJ].

[81]Toth v. Quarles, 350 U.S. 11 (1955).

[82]The Army Almanac 111 (Stackpole Co. 1959).

[83]J. McPherson, *supra* note 72, at 306-07.

[84]See the discussion by Circuit Judge Sanborn in Deming v. McClaughry, 113 Fed. 639 (8th Cir. 1902), *aff'd*, 186 U.S. 49 (1902) (citing AW 97 of 1806 and W. Winthrop, *supra* note 15, at *92-*93).

received substantially the same treatment that would have been his had he been haled before a civilian court of general jurisdiction in his own home state. Thus, even if he served from just after the attack on Fort Sumter until shortly after the Washington victory parade that followed the final surrenders, he had faced a system of justice producing results thoroughly familiar to him and hence completely acceptable.

Accordingly, no change in the system was either suggested or made in the generation that followed. Article of War 77 of the Revised Statutes version declared explicitly that "[o]fficers of the Regular Army shall not be competent to sit on courts-martial to try the officers or soldiers of other forces,"[85] and that provision was accordingly applicable throughout the Spanish War and its sequel, the Philippine Insurrection.

The War with Spain, it is well to remember, was at every higher level conducted by veterans of the Civil War, from President McKinley down;[86] unsurprisingly, they followed Civil War precedents. Consequently, with war impending, Congress enacted, three days before it declared war, that "in time of war, the Army shall consist of two branches, which shall be designated, respectively, as the Regular Army and the Volunteer Army of the United States."[87] And, duplicating what had been done a generation earlier, it was provided that, by and large, the regimental officers of the volunteer forces should be commissioned by state governors.[88] Regular officers could be appointed to these volunteer units by state governors with the concurrence of the President, but, significantly, not more than one such Regular officer was allowed for each regiment.[89] Congress also provided for limited classes of nationwide volunteers, and that was the authority for organizing the Rough Riders, the 1st U.S. Volunteer Cavalry.[90]

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[85]With the proviso, "except as provided in Article 78"—and that referred to "Officers of the Marine Corps, detached for service with the Army by order of the President . . . for the trial of offenders belonging . . . to forces of the Marine Corps so detached."

[86]President McKinley had been a captain and brevet major in the Civil War; Secretary of War Russell A. Alger had been breveted a major general, U.S.V., in 1865; and the Army's Commanding General, Nelson A. Miles, had first become a general officer in 1864. See data under each name in F. Heitman, *supra* note 39.

[87]Act of April 22, 1898, ch. 187, § 2, 30 Stat. 361. The declaration of war was the Act of April 25, 1898, ch. 189, 30 Stat. 364.

[88]*Id.* § 6, 30 Stat. at 362.

[89]*Id.* § 13, 30 Stat. at 363.

[90]See the last proviso of sec. 6, 30 Stat. at 362, authorizing the organization of not over 3000 men "possessing special qualifications." Actually, two other Volunteer Cavalry regiments were formed, the 2nd and 3rd, only to be "almost forgotten," R.

Once the "splendid little war" was over,[91] however, it became necessary to deal with its less than splendid sequel, the Filipinos' opposition to their new American sovereign. This time Congress provided exclusively for volunteers to be raised from the country at large, all of whose officers would be federally appointed.[92]

Contemporaneous War Department rulings held that, notwithstanding Article of War 77, Regular Army officers could lawfully try members of these new federalized volunteers, and Lieutenant Colonel Enoch H. Crowder, later Judge Advocate General, argued vigorously to that effect, first in the Eighth Circuit and then in the Supreme Court. Both tribunals turned him down, however. Consequently, the sentence to imprisonment imposed on Assistant Commissary of Subsistence Peter C. Deming, U.S.V., for the crime of embezzlement was set aside because the court-martial that convicted him had been entirely composed of Regular Army officers.[93]

Nor could a Regular Army officer be insulated and rendered eligible to try Volunteer officers by the circumstance that he himself was holding a higher Volunteer commission. Lieutenant Lewis E. Brown of the Volunteers, sentenced to dismissal because he had been convicted of gambling with enlisted men, was able to recover his accrued back pay because the president of his court-martial, Lieutenant Colonel Haydon Y. Grubbs, 2d U.S. Volunteer Infantry, had also held a Regular Army commission as First Lieutenant, 6th Infantry.[94]

Congress could and, as will be seen, shortly afterwards did authorize officers of the Regular Army to sit on courts-martial trying members of non-Regular forces.[95] But, as the Supreme Court held in the instance last cited, if an individual was disqualified in any respect by his underlying Regular Army commission, that circum-

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Weigley, History of the United States Army 296 (1967). A little later, there were also authorized a volunteer brigade of federal engineers and 10,000 federal volunteers who possessed immunity to tropical diseases. Act of May 1, 1898, ch. 294, 30 Stat. 405; R. Weigley, *supra*, at 296-97.

[91]The quotation is from a letter written after the close of the war, by John Hay, then U.S. Ambassador to Great Britain, to Theodore Roosevelt, who had just completed his military career. *See* F. Freidel, The Splendid Little War (1958).

[92]Act of March 2, 1899, ch. 352, § 12, 30 Stat. 977.

[93]McClaughry v. Deming, 186 U.S. 49 (1902) (affirming Deming v. McClaughry, 113 Fed. 637 (8th Cir. 1902)).

[94]United States v. Brown, 206 U.S. 240 (1907). Details as to names and commissions are from F. Heitman, *supra* note 39, and from the report below, 41 Ct. Cls. 275.

[95]*Infra* Part IV.

stance was neither waived nor cured by the simultaneous possession of a higher commission in a non-Regular component.[96]

IV. WORLD WAR I AND ITS AFTERMATH

When Colonel Winthrop published the second and last edition of his treatise in 1896, he did not think any general revision of the existing Articles of War was either necessary or desirable. He therefore recommended that only eleven or at most thirteen articles be eliminated as "obsolete, superfluous or otherwise undesirable."[97] Apart from a few other amendments, that was enough to satisfy Colonel Winthrop—and he was the individual whom two decades later a Judge Advocate General of the Army would accurately characterize as "the Blackstone of military law."[98]

That later officer was Enoch H. Crowder, whom Justice Frankfurter of the U.S. Supreme Court deemed "one of the best professional brains I've encountered in life."[99] A Military Academy graduate, Crowder was commissioned in the cavalry, participated in some of the last Indian campaigns, and was commissioned a judge advocate in 1895. For ten days in 1901 he was a general officer, U.S.V., and then in 1911 he became Judge Advocate General, an office he was to hold for twelve years.[100] In October 1917 he, along with all other heads of staff departments, received a second star.[101]

General Crowder was strongly of the opinion that the military code

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[96]Under § 100 of the National Defense Act of 1920 (32 U.S.C. § 69 (1926-1946 eds.), a Regular Army officer could, with the President's approval, be commissioned in the National Guard of a State. One instance would be where a National Guard division was composed of units from two States, whose Governors preferred that the division commander be an impartial Regular Officer not affiliated with either State. It was ruled that, in those circumstances, the division commander's status as a Regular was in abeyance for the time being, so that, despite the prohibitions in the Posse Comitatus Act (now 18 U.S.C. § 1385 (1962 ed.)), he could, in his National Guard capacity, assist in suppressing local domestic disorders in the same manner and to the same extent as any other National Guard member of his units. Dig. Op. JAG 1912-30, § 21; Dig. Op. JAG 1912-40, § 480(5).

The same statutory authority for Army Regulars to hold National Guard commissions, now extended to include the Air Force as well, is still in effect (32 U.S.C. § 315 (1982)). But in view of the decision in United States v. Brown, 206 U.S. 240 (1907), discussed in the text, it is not believed that the "so far in abeyance" rationale of the cited JAG rulings can be supported.

[97]W. Winthrop, *supra* note 15, at *1201.

[98]*Establishment of Military Justice: Hearings before a Subcommittee of the Senate Committee on Military Affairs on S. 64*, 66th Cong., 1st sess. 1171 (1919) [hereinafter Establishment], *quoted without attribution in* Reid v. Covert, 354 U.S. 1, 19 n.38 (1957).

[99]Felix Frankfurter Reminisces 59 (H.B. Phillips ed. 1960).

[100]F. Heitman, *supra* note 39; *The Army Almanac* 745 (G.P.O. 1950).

[101]Act of Oct. 6, 1917, ch. 105, § 3, 40 Stat. 398, 411.

embedded in the Revised Statutes was desperately in need of rewriting and of sensible rearrangement. Accordingly, he undertook a complete revision of the Articles of War, a task that occupied him for some ten years.[102] Finally, in 1916, it was passed by Congress, only to be vetoed by President Wilson because retired officers were not subject to its provisions.[103] Congress promptly met the President's objection, and the new Articles of War became effective on March 1, 1917, after the United States had severed diplomatic relations with Imperial Germany but before war was actually declared.[104] This new military code, unlike its several predecessors, was logically arranged and constituted a model measure for a highly trained and thoroughly professional Regular Army, whose aggregate strength in mid-1916 was only 108,000 officers and men.[105]

Actual American participation in hostilities on land had hardly begun in 1917,[106] however, when there surfaced a yawning gap in the new Articles of War that shocked the War Department itself. This was the trial arising out of the riot in Houston, Texas, that involved the 24th Infantry, a Regular Army unit composed of black enlisted men.[107]

In November 1917 sixty-three members of that unit were jointly tried at Headquarters Southern Department, charged with mutiny, murder, assault with intent to commit murder, and willful disobedience of orders. Eighteen persons, including eleven civilians, had been killed.[108] The trial lasted over three weeks and produced a record extending to 2200 pages. At the conclusion of the trial, thirteen of the accused were sentenced to death by hanging. Those sentences were approved by the convening authority on one day, and the thirteen soldiers sentenced to death were jointly hanged the following morning.[109] This was the first mass execution in the

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[102]Sen. Rep. No. 130, 64th Cong., 1st sess. 28; Establishment, *supra* note 98, at 922.

[103]H.R. Doc. No. 1334, 64th Cong., 1st sess.

[104]Act of Aug. 29, 1916, ch. 418, §§ 3-4, 39 Stat. 619, 650; *see* §§ 3-4 at 670.

[105]The Army Almanac 111 (Stackpole Co. 1959).

[106]1 J. Pershing, My Experiences in the World War 217 (1931); H. DeWeerd, President Wilson Fights His War 216 (1968).

[107]For the benefit of those for whom the regimental designation rings no bell, let me recall this fact: The Revised Statutes provided that the enlisted personnel of four Regular Army regiments "shall be colored men," and one of those regiments was the 24th Infantry. R.S. §§ 1104, 1108 (1878).

[108]Establishment, *supra* note 98, at 733.

[109]G.C.M.O. No. 1299, HQ Southern Department, Fort Sam Houston, TX, Dec. 10, 1917; Establishment, *supra* note 98, at 94-97, 1124-26, 1357-58; *Trials by Courts-Martial: Hearings before the Senate Committee on Military Affairs on S. 5320*, 6th Cong., 2d sess. 39-42, 193-209, 1124-26 (1918) [hereinafter Trials by Courts-Martial].

American Army since General Winfred Scott had caused the recaptured deserters of the San Patricio Battalion to be hanged after the capture of Chapultepec.[110] (There had in fact been a mass execution pursuant to the sentence of a military tribunal in 1862, when 38 Sioux Indians were hanged for murder, rape, and arson. Those offenses were essentially war crimes, for which no less than 303 individuals had been sentenced to die. Of that larger number, President Lincoln had determined after personal study of the record that only the smaller group of the most guilty should hang.)[111]

The War Department had not even known of the pendency of the Houston trial, and there the news of its conclusion landed, to quote a contemporary, with a dull thud.[112] But every step taken had been in complete conformity with the new Articles of War. A Department commander had the power in time of war to confirm death sentences for both mutiny and murder, and, where he was also the convening authority, no additional confirming step was necessary.[113] The law then in force did not require anything more, and the 1917 *Manual for Courts-Martial*, implementing the newly enacted military code, included no single word about the functions of the commander's judge advocate in its chapter on "Action by appointing or superior authority."[114] In fact, the record of trial in the Houston riot case had been reviewed daily by the Department judge advocate as it took shape, and eventually further review in the War Department concurred in holding that it was legally sufficient[115]—not that any of the thirteen soldiers already hanged could have been resurrected by a contrary conclusion.

General Crowder had not fully anticipated such an incident when he explained to the Senate Committee in 1916 why the new Articles of War whose adoption he was urging contained no specific authorization for appellate review.

> In a military code there can be, of course, no provision for courts of appeal. Military discipline and the purposes which it is expected to subserve will not permit of the vexatious delays incident to the establishment of an appellate procedure. However,

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[110]C. Elliott, Winfield Scott: The Soldier and the Man 517, 546 n.27, 555-56 (1937); S. Chamberlain, My Confession 226-28 (1956).

[111]1 C. Sandburg, Abraham Lincoln: The War Years 614-15 (1936).

[112]*Ex rel.* the late Colonel William Cattron Rigby, JAGD; Washington Post, Dec. 12, 1917, at 4.

[113]AW 48 of 1916.

[114]MCM, 1917, ch. XVI.

[115]Trials by Courts-Martial, *supra* note 109, at 1124-26.

> we safeguard the rights of an accused, and I think we effectively safeguard them, by requiring every case to be appealed in this sense, that the commanding general convening the court, advised by the legal officer of his staff, must approve every conviction and sentence before it can become effective, and in cases where a sentence of death or dismissal has been imposed there must be in addition the confirmation of the President.[116]

In the Houston riot case, for reasons already stated, the law did not require presidential confirmation of the death sentences imposed, and although the case had indeed arisen in time of war, the fact that the proceeding had not occurred in a war zone but only in domestic territory contributed to the shock that its result brought to Washington. Consequently, immediate steps were taken to avert repetition of any similarly drastic outcome. First, it was ordered that no death sentences could thereafter be confirmed in the United States until the case had been reviewed in the War Department.[117] Second, less than three weeks later, a general review procedure was prescribed for all death, dismissal, and dishonorable discharge cases.[118] And third, although the Department commander in question had fully complied with the new Articles of War, his action thereunder reflected such utter lack of judgment that he was relieved from command and reduced in rank.[119]

If the new military code was capable of producing such a shocking result while dealing with the small Regular component of the Army, what would be its effect on the four million man Army raised under the Selective Draft Act of 1917 for the war then flagrant? Most of those millions, including almost all junior officers, had necessarily been very hastily trained, and virtually all of them remained pure civilians at heart to the very end. So, once the Armistice was signed and the bulk of those in uniform had been relieved from further military duty, complaints began. All were loud, and many were thoroughly justified.[120]

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[116]Sen. Rep. No 130, 64th Cong., 1st sess. 34-35.

[117]Trials by Courts-Martial, *supra* note 109, at 1124-26.

[118]G.O. 7, War Dep't, Jan. 17, 1918. Later printings of the 1917 MCM included this G.O. and the procedure thereunder as Appendix 20.

[119]Major General John W. Ruckman, N.A., The Department Commander, was a USMA graduate born in and appointed from Illinois (*see* F. Heitman, *supra* note 39). For his relief from command, see Order of Battle of U.S. Land Forces in the World War, Zone of the Interior 602 (1949); for his demotion to permanent rank, see Army Register 1920, at 8.

[120]*E.g.*, Bruce, *Double Jeopardy and the Power of Review in Court-Martial Proceedings*, 3 Minn. L. Rev. 484 (1919); Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L.J. 52 (1919).

First, the Civil War/Spanish War safety valve that prohibited all Regular officers from sitting on courts that tried personnel of non-Regular forces had been eliminated.[121] That prohibition was perhaps inherently illogical, but it had its uses when the Nation's full-time military force was suddenly increased forty-fold.

Next, the lack of a table of maximum punishments in time of war resulted in the imposition of excessive sentences so unrealistic that they lost all deterrent effect and produced only resentment.[122]

Third, charges could be and were referred for trial without the slightest preliminary investigation, in consequence of which many quite groundless matters required the attention of the full panoply of a general court-martial.

Fourth, not a single syllable in the 1916 Articles of War required legal review prior to the approval or execution of a sentence, and the only reference to defense counsel, in article 17, read as follows: "The accused shall have the right to be represented before the court by counsel of his own selection for his defense, if such counsel be reasonably available, but should he, for any reason, be unrepresented by counsel, the judge advocate shall from time to time throughout the proceedings advise the accused of his legal rights."

Finally, settled military law recognized the undoubted power of the officer convening the court-martial to disapprove acquittals and to return the proceedings for revision with a view to both a different result and to the imposition of a more severe sentence for those who had been convicted. I say "undoubted," because that power of revision had been sustained by the Supreme Court in two cases, notably that of Brigadier General David G. Swaim.[123] That individual holds the dubious distinction of being the first (and up to now the only) Judge Advocate General of the Army to be tried by court-martial. He was convicted, but initially sentenced only to be suspended from rank, duty, and pay for three years.

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[121]AW 4 of 1916. This had been preceded by the short-lived and soon forgotten Volunteer Act of 1914 that abolished all distinctions between officers of the several components in respect of service on courts-martial. Act of April 25, 1914, ch. 71, § 4, 38 Stat. 347, 347-48. Interestingly enough, Brigadier General Crowder, TJAG in 1914, had earlier argued—and lost—in support of the jurisdiction in the *Deming* case, both in the 8th Circuit, 113 Fed. 639 (8th Cir. 1902) and in the Supreme Court, 186 U.S. 49 (1902) (holding that court-martial composed of Regular officers could not try officer of Volunteers).

[122]AW 45 of 1916. "Maximum Limits," was applicable only "in time of peace."

[123]Swaim v. United States, 165 U.S. 553 (1897) (following *Ex parte* Reed, 100 U.S. 13 (1879)).

When the President, who had appointed the court that tried General Swaim, sent the proceedings to the Attorney General, that official remarked that "[i]t should not be necessary to prove that an individual is a moral monstrosity to demonstrate his unfitness to be a trusted officer of the Army."[124] The President sent that opinion to the court-martial, looking for a sentence of dismissal. On revision, however, the court substituted a sentence that would have reduced the accused to the rank of Major, Judge Advocate. But since such a step would then have involved presidential nomination and Senate confirmation for a nonexistent vacancy, the proceedings were returned a second time. Even then, no dismissal resulted. The sentence finally adjudged was suspension from rank and duty for twelve years and forfeiture of one-half pay for that period. At this point all that the President could do was to approve, most reluctantly, that final sentence against General Swaim.[125] Ironically, that action punished primarily Colonel G. Norman Lieber, who thus became Acting Judge Advocate General in the lower grade for the ten years that elapsed before General Swaim ultimately retired.[126]

It would be difficult for anyone to imagine a more striking instance of command influence. Yet, as I say, it was sustained by the nation's highest court, with the consequence that the practice of revision upward, and of the reconsideration of acquittals, was continued throughout all of World War I until, in 1919, it was prohibited by regulation.[127]

The cumulative effect of all the foregoing illustrations of the new military code brought on, as has been indicated, a spate of complaints, from lawyers and laymen alike, and ultimately resulted in a thick volume of thorough and most illuminating hearings. Those that took place before the Senate Military Affairs Committee between August and November 1919, entitled *Establishment of Military Justice*, set forth all the details.[128]

The result of those hearings was the 1920 revision of the Articles

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[124]18 Op. Att'y Gen. 113, 117; 28 Ct. Cls. 173, 195, 198.

[125]G.C.M.O. 19, HQ/Army, Feb. 24, 1885, set forth in Robie, *The Court-Martial of a Judge Advocate General: Brigadier General David G. Swaim (1884)*, 56 Mil. L. Rev. 211, 226-27 (1972).

[126]F. Heitman, *supra* note 39.

[127]G.O. 88, War Dep't, July 14, 1919. For the practice during World War I, see Trials by Courts-Martial, *supra* note 109, at 34-35, 246-66, and Establishment, *supra* note 98, at 1379-80.

[128]Already several times cited as Establishment, *supra* note 98.

of War.[129] Every multi-member court-martial thereafter appointed was required to include the naming of defense counsel.[130] Every general court-martial would include a law member, either a judge advocate or another officer "specially qualified," who would make most interlocutory rulings.[131] No charge could be referred for trial in the absence of a preliminary investigation or of the advice of the convening authority's staff judge advocate.[132] The power to prescribe maximum punishments was extended to time of war.[133] Further, to discourage unduly harsh sentences for simple absence without leave—those had been adjudged for their deterrent effect during the war, in the face of more than 14,000 instances of AWOL's at the Hoboken Port of Embarkation in 1918[134]—absence "with the intent to avoid hazardous duty or to shirk important service" was specifically classed as desertion.[135] No acquittal and no sentence deemed inadequate could henceforth be returned for revision.[136] And no sentence extending to death, dismissal, or dishonorable discharge could be executed until it had first been held legally sufficient by a board of review of three officers in the Judge Advocate General's office.[137] Provision was also made, in the event of a holding of insufficiency, for a retrial, called a rehearing, before a court composed of members who had not participated in the first trial.[138] Up to then no system of military law had included any such provision, an omission that the wartime Secretary of War, Mr. Newton D. Baker, deemed a significant defect.[139]

Those 1920 Articles became effective in February 1921, by which time a new and distinctly verbose *Manual for Courts-Martial* had been prepared.[140] And, except for a few die-hard doctrinaires, it was the consensus among military lawyers that every door in the court-martial stable had now been securely locked.

But, while enacting the foregoing changes, the 66th Congress advisedly rejected certain more drastic proposals that were the nominal

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[129]Act of June 4, 1920, ch. 227, ch. II, 41 Stat. 759, 787, later 10 U.S.C. §§ 1471-1593 (1926-1946 eds.).
[130]AW 11 of 1920.
[131]AW 8 of 1920.
[132]AW 70 of 1920.
[133]AW 45 of 1920.
[134]Establishment, *supra* note 98, at 1155-62.
[135]AW 28 of 1920.
[136]AW 40 of 1920.
[137]AW 50½ of 1920.
[138]*Id.*
[139]Establishment, *supra* note 98, at 1340.
[140]Effective date, Sec. 2 of Ch. II, 41 Stat. at 812.

subject of the 1919 hearings. Those were contained in S. 64, a measure sponsored by Senator George E. Chamberlain of Oregon but actually drafted by Mr. Samuel T. Ansell,[141] who during most of World War I had been Acting Judge Advocate General with the rank of Brigadier General.[142]

As submitted, S. 64 fixed the composition of a general court-martial at eight members, three of whom were required to be privates when a private soldier was on trial, and, when a noncommissioned or warrant officer was being tried, three members were required to be noncommissioned or warrant officers. Special courts-martial were to consist of three members, one of whom was required to be of the same status below commissioned rank as the individual on trial.[143] The appointing authority of general or special courts-martial could not select their members; he was only allowed to "designate a panel. . . consisting of those who [were] by him deemed fair and impartial and competent to try the cases brought before them."[144]

But the appointing authority was directed to select a judge advocate for both general and special courts. That individual for a general court was required to be a Judge Advocate General's Department officer if available or else one recommended by the Judge Advocate General "as specially qualified by reason of legal learning and experience" or, for a special court, as "best qualified by reason of legal learning or aptitude or judicial temperament."[145] This judge advocate would not be a member of the court. Instead, he would: organize the court from the panel designated by the appointing authority; rule on all questions of law arising in the proceedings; sum up the evidence in the case and discuss the law applicable to it; approve a finding of guilty or so much of it as involved a finding of guilty of a lesser included offense; announce the findings of the court and upon conviction impose sentence on the accused; and suspend in whole or in part any sentence that did not extend to death or dismissal.[146]

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[141]Establishment, *supra* note 98, at 102.

[142]Establishment, *supra* note 98, at 52-53; Ex. 155, Establishment, *supra* note 98, at 1078, setting forth the precise dates. From April 20 to July 15, 1918, General Ansell was absent on an official trip to Europe. Establishment, *supra* note 98, at 747-48; Ex. 132-135, Establishment, *supra* note 98, at 1035-37.

[143]Arts. 5 and 6, Establishment, *supra* note 98, at 6.

[144]Art. 10, Establishment, *supra* note 98, at 6.

[145]Art. 12, Establishment, *supra* note 98, at 6-7.

[146]Art. 12, Establishment, *supra* note 98, at 7.

Finally, S. 64 provided for a three-member civilian court of military appeals with broad revisory powers, which would pass on any sentence of death, dismissal, or dishonorable discharge approved for any offense committed and tried since April 6, 1917, the date of the American declaration of war against Germany.[147]

Unfortunately, the far-reaching professional differences of opinion about the respective merits and demerits of the 1916 Articles of War and the Chamberlain-Ansell proposals were badly marred—and unnecessarily complicated—by the sustained and bitter personal attacks launched by the draftsman of S. 64 against virtually every individual who had ever disagreed with him over the two years preceding the hearings. The details of that secondary conflict add up to an unpleasant, even ugly, spectacle. It is only recently, more than two generations after the event, that its impact on the basic issues has been recounted in detail.[148]

V. FROM THE 1920 ARTICLES OF WAR THROUGH WORLD WAR II TO THE UNIFORM CODE

So far as an accused person's rights and safeguards were concerned, the 1920 Articles of War were very far in advance of anything in contemporary American civilian law, both state or federal. First of all, the military accused was given appointed counsel by article 11 of 1920, whereas the indigent federal defendant in noncapital cases had to wait for this benefit until *Johnson v. Zerbst* in 1938.[149] I can personally recall witnessing, in the late 1930's, federal defendants being tried in U.S. district courts without any assistance whatever from counsel and without anyone present to record what was being said. And counsel for criminal defendants in state courts was specifically rejected as late as 1942 in *Betts v. Brady*,[150] granted only on particular facts in 1948 and 1949 cases,[151] and not made universally available until *Gideon v. Wainwright*[152] in 1963.

Article of War 50½ of 1920 provided automatic appellate review at public expense to the military accused. Yet, more than thirty-five

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[147]Art. 52, Establishment, *supra* note 98, at 13-14.

[148]See the present author's article, *The Seamy Side of the World War I Court-Martial Controversy*, 123 Mil. L. Rev. 109 (1989).

[149]304 U.S. 458 (1938).

[150]316 U.S. 455 (1942).

[151]Uveges v. Pennsylvania, 335 U.S. 437 (1948); Gibbs v. Burke, 337 U.S. 773 (1949).

[152]372 U.S. 335 (1963).

years later, the criminal defendant's hope for similar support in civilian federal courts continued to be bogged down in certificates of good faith[153] and in questions of how far appointed counsel were required to exert themselves on behalf of court-provided clients.[154]

Similarly, article 111 of 1920, continuing a provision on the books since 1776,[155] conferred on every accused before a general court-martial the right to receive without cost a copy of the record of his trial. But the criminal defendant in a federal court had no similar right until 1944,[156] nor was the position of a state criminal defendant clarified until 1956.[157]

Nevertheless, notwithstanding all of the foregoing, the operation in World War II of the genuinely enlightened 1920 Articles of War was followed by a longer and louder uproar than the one arising from the functioning of the 1916 Articles during World War I. Not only that, but within less than six years after V-J Day, the military code was twice subjected to very far-reaching legislative revisions. The first of these, the Elston Act of 1948, applied only to the Army and the newly constituted Air Force.[158] The second, the Uniform Code of Military Justice, was enacted by Congress in 1950, effective in 1951, to govern all three services.[159]

Here the paradox is that no even comparable clamor arose in respect of the Articles for the Government of the Navy, a measure dating from 1862, early in the Civil War, which had never been modernized in any significant respect.[160]

Let me first dispose of the Navy's position. Service in the U.S. Navy in both World Wars, like service in the Union Army during the Civil War, did not involve rearrangement of the individual's position in

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[153]Johnson v. United States, 352 U.S. 565 (1957).

[154]*E.g.*, Ellis v. United States, 356 U.S. 674 (1958).

[155]Sec. XVIII, Art. 3, ¶ 3, of 1776; AW 90, ¶ 2, of 1806; AW 114 of 1874; AW 111 of 1916.

[156]Act of Jan. 20, 1944, ch. 3, 58 Stat. 5, enacted after the decision in Miller v. United States, 317 U.S. 192 (1942); see H.R. Rep. No. 868, 78th Cong., 2d sess.

[157]Griffin v. Illinois, 351 U.S. 12 (1956); Eskridge v. Washington Prison Board, 357 U.S. 214 (1958).

[158]Act of June 24, 1948, title II, ch. 625, 62 Stat. 604, 627. The Articles of War as thus amended were made applicable to the newly created United States Air Force by Act of June 25, 1948, ch. 648, § 2, 62 Stat. 1014.

[159]Act of May 5, 1950, ch. 169, 64 Stat. 108, *later codified by* Act of Aug. 10, 1956, ch. 1041, 70A Stat. 1, 36, and now, *as amended*, 10 U.S.C. §§ 801-940 (1982 & Supp. V 1987).

[160]See the amendments to R.S. § 1624, enacted in 1862, that are listed in 34 U.S.C. § 1200 (1926-1946 eds.).

his community. As has been shown, the Civil War's army Volunteers could only be tried by courts-martial composed of Volunteer officers. And the Navy, in World War II as in World War I, commissioned its nonregular officers on the basis of educational qualifications—which is to say, from those who had the ability, or more generally simply the means, to acquire a college degree.

But the mass American armies of the Second World War were officered by persons competitively selected, following passage through the rigorous proving ground of the Officer Candidate School. Consequently, as in James M. Barrie's play, *The Admirable Crichton*, the butler rather than the country club member frequently wound up as the commander who issued the orders. Necessarily, the inescapable social inversion thus created brought out loud, articulated, and widespread unhappiness. It was, I submit, this widely felt resentment that fueled the significant recasting of the Articles of War in 1948—while simultaneously leaving untouched the 1862 Articles for the Government of the Navy.

The issue of appropriate procurement and training of the Army's officer candidates in World War II was advisedly determined at its highest levels. Secretary Stimson, Under Secretary Patterson, and Assistant Secretary McCloy favored civilian training camps. In the First World War, the United States Army had copied the British model of commissioning college-trained individuals, on the view that they would excel in leadership qualities.

But, after enactment of the Selective Service Act in 1940, the Army's Chief of Staff, General Marshall, thought otherwise. He believed that every officer should have a taste of a private soldier's life prior to being commissioned, and accordingly recommended that candidates be selected by the officers under whom they had trained. The Chief of Staff called on his staff to study other methods, including particularly the Navy's practice of commissioning college graduates. And he offered to make commissions available to qualified men not in the service who would volunteer for Officer Candidate School after completing basic training as enlisted men.

General Marshall felt so strongly that the choice between the two systems was so basic that it really involved the question whether he and his staff were to determine military matters or whether those should be decided by civilians. Accordingly, he threatened to resign if his views were rejected—after which Mr. Stimson backed down.[161]

[161]The foregoing three paragraphs are based on F. Pogue, George C. Marshall: Ordeal and Hope, 1939-1942, at 101-03 (1966).

Making graduation from Officer Candidate School the only additional source of commissions may have produced a more capable officer corps; views on that matter must necessarily be speculative. Certainly the matter now being discussed did not surface in the opposing arguments on the best method of training individuals to be commissioned. But it is the fact that, in consequence of the Army system of officer procurement, which resulted in much social inversion, there were widespread complaints triggering the 1948 rewriting of the Articles of War. Contrariwise, the Navy's officer selection scheme, which left its augmented wartime personnel in the same position of authority and prerequisites as they had either enjoyed or suffered under while still civilians, did not evoke any similar agitation for amendment of the Articles for the Government of the Navy.

It is true that, after World War I, during which both Army and Navy had employed identical officer procurement plans, there was a tremendous outcry against the operation of the 1916 Articles of War. To some extent, this was a consequence of permitting Regulars to try non-Regulars, a practice forbidden in both the Civil and the Spanish Wars. In part also, the complaints reflected the failure of the 1916 military code to make adequate provision for defense counsel, for review following approval of sentences, or for curbs against excessive sentences.

But why did the obviously progressive 1920 Articles of War fail to attain the confident hopes of its framers and instead call forth after V-J Day in 1945 dissatisfaction with the Army's military justice system even more widespread than that heard after Armistice Day in 1918?

The present author will yield to no one in personal admiration, esteem, or even near veneration of George Catlett Marshall; that outstanding soldier and statesman has long been one of his very few heroes. But a lifetime spent in the study, formulation, and practice of military law has confirmed me in the view that the primary cause of subsequent complaint against that head of jurisprudence rests on the extent of social inversion involved in the assembling of those who, not normally but only in time of war or national hostilities, become subject to its provisions.

If that conclusion is mistaken, what else can explain why the outcry over the operation of the reformed 1920 code equaled or exceeded that over the unreformed 1916 provisions—apart, of course, from the fact that more persons were subject to the Army's discipline in World War II, and for a longer time, that had been so in World War

I? After all, the same factors of larger numbers and longer time were also true of the Navy in the later conflict.

It is now time to detail the operation of the 1920 Articles of War. Not very long after they became effective, it was ruled that there was sufficient compliance with the law member provision if such an officer was named in the order appointing the general court-martial, and that, once named, it was not required that he actually attend the trial.[162] Having regard to the size of the Army between the two world wars, when from 1923 to 1933 it never exceeded 143,000 officers and men,[163] such a ruling was not only understandable but actually necessary. Where could there be found travel money to move qualified law members form their duty stations to the widely scattered posts where the trials were actually held? Nor should it be forgotten that, even as late as mid-1940, there were only eighty-six officers permanently commissioned in the Judge Advocate General's Department of the Army.[164]

In addition, the painfully verbose 1921 Manual was, seven years later, rigidly compressed and abbreviated to produce a new edition. This was fine for a small, even minuscule Army, which was a highly trained professional force; there was no need for such a book to deal with war offenses, nor to linger over the 1921 Manual's illuminating treatment of the insanity defense.

Finally, the single true loophole in the 1920 code affected only those very few individuals who, in time of peace and obvious outward prosperity, undertook to enlist in the Regular Army. Whenever a general court-martial adjudged a sentence of dishonorable discharge, the execution of which was not ordered suspended, the resultant conviction required review under Article of War 50½. But if that sentence was ordered suspended and the reviewing authority shortly thereafter revoked the suspension, such appellate review could be by-passed—and often was.

Unfortunately the military penury between the war had dulled the imagination and dimmed the vision of those charged with the supervision of military justice. Of course, it is easy now to point out what should have been but was not done. Once Guardsmen and Reservists could be ordered to active duty,[165] once the Selective Training and

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[162]Dig. Op. JAG 1912-1930, § 1340; Dig. Op. JAG 1912-1940, §§ 365(9) and 365(10).
[163]The Army Almanac 111 (Stackpole Co. 1959).
[164]Annual Report of the Secretary of War, 1940, at 27-28.
[165]Jt. Res. of Aug. 27, 1940, ch. 689, 54 Stat. 858.

Service Act of 1940 became effective,[166] but certainly within six months of the declarations of war that followed the Pearl Harbor attack,[167] the real lesson of World War I should have been taken to heart. The military justice system should have been drastically adjusted to the wholly changed environment that obtained when there were no further shortages of either personnel or funds.

The trimmed-down 1928 Manual should have been enlarged to meet the needs of an active duty officer corps that had grown from less than 14,000 in 1940[168] to 841,000 in mid-1945.[169] Regulations should have required actual presence of the law member at all times and should similarly have required that the trial judge advocate and defense counsel of every general court-martial be qualified lawyers. The people were there; able-bodied lawyers in the thousands were actually clamoring for commissions, and the Army had the flower of the American bar from which to recruit. Also by regulation, every convening authority should have been required to communicate directly with this staff judge advocate and forbidden to layer him under chiefs of staff, G-1's, or directors of administration. And suspended sentences to dishonorable discharges should never have been permitted to be executed in the absence of completed appellate review or of a meaningful hearing for the prisoner.

But all that is hindsight, invariably infallible. In actual fact, the theoretical perfection of the 1920 revision had induced in its practitioners so smug a sense of complete self-satisfaction that they were blinded to the basic problem—and that was the monumental difference between governing a small professional force and one forty times larger composed primarily of nonprofessionals. The consequence was that a disciplinary code that worked almost flawlessly for the smaller body evoked shrill post-war complaints about its impact on most of the multimillion-member wartime Army, which then included the Army Air Forces.[170] Once again, extensive post-war modifications of the Articles of War was the inevitable result.

Those changes, which substantially amended over one-third of the 1920 Articles, were effected by Title II of the Selective Service Act

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[166]Selective Training and Service Act of [Sept. 16,] 1940, ch. 720, 54 Stat. 885.

[167]Jt. Res. of Dec. 8, 1941, ch. 561, 55 Stat. 795 (Japan); of Dec. 11, 1941, ch. 564, 55 Stat. 796 (Germany); and of Dec. 11, 1941, ch. 565, 55 Stat. 794 (Italy).

[168]Annual Report of the Secretary of War, 1940, at 26.

[169]The Army Almanac 627 (G.P.O. 1950).

[170]The highest strength reached by the Army, ground and air, commissioned and enlisted, was 8,291,336 in May 1945. *Id.*

of 1948, known as the Elston Act after the Chairman of the House Armed Services Committee.[171]

Some of those amendments effected changes that the Army should have adopted on its own not later than the middle of 1942. First, the law member was required to be present at all times.[172] Next, both trial judge advocate and defense counsel were required to be lawyers, if available, to function in all trials by general court-martial, with the significant proviso that if the prosecutor was a lawyer, defense counsel must also be one.[173] And no dishonorable discharge once suspended could be executed until the prescribed appellate review had been completed.[174]

Other provisions of the Elston Act broke new ground. For the first time in American military history, enlisted personnel were authorized to sit as members of courts-martial. This had been one of the Ansell proposals in 1919, even to the extent of having privates sit on courts trying privates.[175] But, while allowing enlisted men to constitute at least one-third of the court's total membership, if so requested by an enlisted accused, this concession to populist sentiment was effectually negatived by a further paragraph of the identical Article of War:[176]

> When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command and when eligible those enlisted persons of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers and enlisted persons having less than two years' service shall not, if it can be avoided, be appointed as members in excess of minority membership thereof.

Necessarily, compliance with that quoted provision would prohibit privates trying privates, and would almost invariably place on courts made up in part of enlisted personnel experienced noncommissioned officers who had but little patience with soldiers given, in the colloquial phrase, to goofing off regularly.

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[171] *Supra* note 158.
[172] AW 8 of 1948.
[173] AW 11 of 1948.
[174] AW 51(b) of 1948.
[175] Arts. 5 and 6 of S. 64, 66th Cong., 1st sess., Establishment, *supra* note 98, at 6.
[176] AW 4 of 1948.

The Elston Act also provided a very elaborate system of appellate review, which included a Judicial Council of three general officers drawn from the newly renamed Judge Advocate General's Corps (JAGC), thus adding an extra layer of further examination over the existing boards of review. The details of this expanded reviewing process were fully as complex as the wiring diagram of a large automobile's dashboard.[177]

In addition to the rehearings previously authorized by Article of War 50½ of 1920 after a conviction had been set aside on the basis of the original record, article 53 of 1948 retroactively provided for a new trial based on evidence *dehors* that record. The fact that out of fifty-five World War II cases examined under article 53 only four new trials were granted, or a mere seven per cent of those applied for out of the many thousands of convictions by court-martial during that conflict, furnishes proof after the fact that very little actual injustice had marred the operation of the military code that Congress had enacted in 1920.[178]

Finally, the power that had always been vested in field commanders in time of war to confirm death sentences in respect of a limited number of specified crimes and sentences of dismissal involving officers below general officer rank[179] was withdrawn. Under the Elston Act, only the President could thereafter confirm death sentences, while dismissal of other than general officers would be confirmed by the Judge Advocate General with the concurrence of the Judicial Council, or by the Secretary concerned if there was disagreement between those two.[180] Curiously enough, the elimination of field commanders' powers of confirmation, exercised by the Army's theater commanders in World War II, was effected *sub silentio*; neither the committee report on the Elston Act nor the debates thereon include any specific discussion of that break with the past.[181]

Statistics show that, out of 142 death sentences adjudged and executed by Army courts-martial during and after World War II—similar sentences imposed by military commissions acting in war crimes cases

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[177]AW 50 of 1948. The present author undertook an explanation of that process in a 1948 pamphlet, The New Articles of War (Infantry Journal Press).

[178]Memorandum Decisions of The Judge Advocate General of the Army, When Acting Upon Applications for Relief under Article of War 53, 1949-1950. When post-war applications are included, there is a total of 134 cases, in only seven of which (or 5.22 per cent) new trials were granted.

[179]AW 65 of 1806; AW's 105 and 106 of 1874; AW 48(b) and 48(d) of 1916 and 1920.

[180]AW 48 of 1948.

[181]H.R. Rep. No. 1034, 80th Cong., 1st sess. 12, 19-20, 94 Cong. Rec. 157-90, 205-17.

are advisedly excluded from that figure—only a single such sentence was executed in respect of a purely military offense.[182] This was the first such instance since the Civil War,[183] and it involved an instance of repeated desertion in the face of the enemy. That case, concerning Private Eddie Slovik, has given rise to infinite discussion, much of it hopelessly infected with sentimentality, and virtually all of it formulated without the slightest regard to the justice or otherwise of ordering troops to advance against the enemy to substantial risk of wounds or death, while the skulker who deliberately refuses a like order is spared all danger. But it remains all too clear that confirmation of the death sentence in Slovik's case reflected less a deliberately fashioned disciplinary policy than simply a record completely devoid of a single mitigating or redeeming feature.[184]

The Elston Act became effective on February 1, 1949, and was duly implemented by a 1949 Manual for Courts-Martial. But the ink was hardly dry on both before Congress enacted an even more far-reaching recasting of the military law, approved on May 5, 1950, and effective in its major features on May 31, 1951.[185]

Why? There had been no expressed dissatisfaction with the Articles of War as amended by the Elston Act, or with the Articles for the Government of the Navy that had aroused no substantial vocal discontent since their enactment nearly ninety years earlier.

Formulation of the Uniform Code of Military Justice (UCMJ) can only be explained as a manifestation of the urge to unify that was then widespread. Just a year before the Elston Act was passed, Congress had created a separate Air Force and had superimposed on the existing military departments a Secretary of Defense to supervise all three armed services.[186] In consequence, uniformity became a near

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[182]Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 Mil. L. Rev. 39, 40 n.4 (1972).

[183]No death sentences in respect of purely military offenses were executed in World War I. Establishment, *supra* note 98, at 1356.

[184]The references that follow are listed in the order of their publication: W. Huie, The Execution of Private Slovik (1953); Wiener, *Lament for a Skulker*, 4 Combat Forces J. 33 (July 1954); Kimmelman, *The Examples of Private Slovik*, 36 Am. Heritage 97 (1987); letter, Dr. B.B. Kimmelman to the present author, Sept. 15, 1987: "Thank you for forwarding a copy of your excellent article, 'Lament for a Skulker.' I regret I was not aware of it until now; it should have gotten much attention at the time, since it was so thorough, and took issue with Huie on several major points."

[185]*Supra* note 159.

[186]The National Security Act of [July 26,] 1947, ch. 343, 61 Stat. 495, created the National Military Establishment, the Department of the Air Force and the United States Air Force, and provided for a Secretary of Defense. But the National Military Establishment was not constituted as a Department of Defense nor declared to be an executive

fetish—even though skeptics might with accuracy comment that, with three Judge Advocates General in place of the former two,[187] plus a separate legal staff for the Secretary of Defense, the new organization really amounted to triplification with a fringe on top.

Chosen as draftsman of the Uniform Code of Military Justice was Professor Edmund M. Morgan of the Harvard Law School. It is not yet precisely clear why he was appointed.[188] In retrospect his selection is very difficult to justify. He had been on the Ansell side in the 1919 court-martial controversy, and had for thirty years adhered to the views he had then formulated, this with the tenacity of a mountaineer feudist who has outlived all of his earlier opponents.[189]

Yet sufficient flaws in Professor Morgan's outlook could readily have been ascertained prior to his appointment. He had sharply criticized Winthrop's view of a court-martial as "*instrumentalities of the executive power*" and as "a purely executive agency designed for military uses,"[190] yet entirely overlooked Winthrop's insistence, just seven pages farther along in his treatise, that a court-martial was indeed "a court of law and justice."[191] In this unjustifiable omission he was simply repeating Ansell's earlier inaccuracy.[192]

Mr. Morgan insisted that the 1882 U.S. Circuit Court ruling on Revised Statutes § 1199 was ill-considered dictum,[193] yet he never argued against General Crowder's view of the half-century of practice under

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department until passage of the National Security Act Amendments of [Aug. 10,] 1949, ch. 412, § 4, 63 Stat. 578, 579.

[187]The Act of June 25, 1948, ch. 648, 62 Stat. 1014, created the position of Judge Advocate General of the Air Force.

[188]The matter is sought to be explained in W. Generous, Swords and Scales 35-37 (1973). But this is a volume of very questionable realibility; *see* Wiener, Book Review, 59 Corn. L. Rev. 748 (1974). Perhaps Professor Jonathan Lurie of Rutgers University, currently serving as Historian of the U.S. Court of Military Appeals, will be able to supply a more convincing explanation when his work on that tribunal is ultimately published.

[189]See (a) his original testimony, Establishment, *supra* note 98, at 1371-95; (b) the following among his articles, *The Existing Court-Martial System and the Ansell Army Articles*, 29 Yale L.J. 52 (1919); *Eugene Wambaugh*, 54 Harv. L. Rev. 4 (1941); *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169 (1953), *reprinted in* 28 Mil. L. Rev. 17 (1965); and (c) his testimony on the UCMJ before both the Senate and House Committees on Armed Services *passim*.

[190]W. Winthrop, *supra* note 15, at *54.

[191]W. Winthrop, *supra* note 15, at *61-*62. See, for the criticism, 29 Yale L.J. at 66.

[192]"But Col. Winthrop was first a military man, and he accepted easily and advocated the view that courts-martial are not courts, but are simply the right hand of the military commander." Mr. S.T. Ansell, Establishment, *supra* note 98, at 123.

[193]29 Yale L.J. at 66, n.48. The decision itself was not reported until 1919. *Ex parte* Mason, 256 Fed. 384, 387 (C.C.N.D.N.Y. 1882).

that provision, which was in accord with that ruling.[194] Nor did Mr. Morgan argue against Secretary Baker's view for not reversing that practice, on the ground that it was unwise to extract new grants of power by reinterpreting familiar statutes with settled practical construction.[195] So far as Mr. Morgan was concerned, neither General Crowder nor Mr. Baker had ever even gone on record. If he ever knew that the Secretary of War's conclusion in no sense represented perfunctory approval of a senior subordinate's conclusion, but instead was the result of personal examination in a law library of the authorities presented in support of conflicting views,[196] nothing that Professor Morgan ever said or wrote reflected that fact.

Moreover, Mr. Morgan's 1919 assertions to the Senate Committee regarding contemporary British military law were demonstrably incorrect. He said that "there is an appeal from the general court-martial to the civil courts in England," citing and discussing the eighteenth century case of Lieutenant Frye of the Royal Marines.[197] That testimony by Professor Morgan clearly confused direct appellate review by the civil courts with subsequent collateral civil actions.

The actual British law, in 1919 and until 1952, was that there was no direct appeal to the civil courts from the decision of a court-martial.[198] All that was permitted was a subsequent action at law for damages when a superior officer had acted in connection with a court-martial either without jurisdiction or in excess of jurisdiction. That was Lieutenant Frye's case,[199] that was the case of the Gibraltar carpenter mentioned by Lord Mansfield in his judgment in *Mostyn v. Fabrigas*,[200] and that was the series of lawsuits brought by the ever litigious Captain and Lieutenant Colonel William Gregory Dawkins

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[194]Ex. B, Establishment, *supra* note 98, at 64-71; Ex. 34, Establishment, *supra* note 98, at 847-54.

[195]Establishment, *supra* note 98, at 71, 117; Ex. 34, Establishment, *supra* note 98, at 854. For a later and longer memorandum by Secretary Baker to the same effect, see Ex. G, Establishment, *supra* note 98, at 90-91; Ex. 52, Establishment, *supra* note 98, at 893-894.

[196]Establishment, *supra* note 98, at 1343.

[197]Establishment, *supra* note 98, at 1386.

[198]Manual of Military Law 120 (1914 ed.); Grant v. Gould, 2 H. Bl. 69 (1972); Sutton v. Johnstone, 1 T.R. 493 (1785); 10 W. Holdsworth, A History of English Law 382-86 (1938). The first direct appeal from a court-martial to a civil court, effective May 1, 1952, was authorized by the Courts-Martial (Appeals) Act of 1951, 14 & 15 Geo. VI ch. 46.

[199][R. Scott], The Military Law of England 167-70 (1810) (citing 2 McArthur, Naval and Military Courts Martial 229 (3d ed. 1806)).

[200]1 Cowp. 161, 175-76 (1774); same case *sub. nom.* Fabrigas v. Mostyn, 20 How. St. Tr. 81, 232. The actual case involved Stephen Conning, Master Carpenter of the Office of Ordinance. Civilians, *supra* note 7, at 16.

of the Coldstream Guards.[201] But not a single one of all those instances supports in the slightest Professor Morgan's 1919 statement that "there is an appeal from a general court-martial to the civil courts in England."

Turning to Professor Morgan's substantive draftsmanship three decades later, one flaw therein became apparent within ten years after the Uniform Code's effective date. He had of course *carte blanche* to revise the punitive articles, as set forth both in the 1948 Articles of War as well as in the Articles for the Government of the Navy that dated from 1862. And he did so, adding definitions and offenses that had never before been specifically mentioned in any American military code: article 77, Principals; article 78, Accessory after the Fact; article 80, Attempts; article 81, Conspiracy; article 115, Malingering; and article 127, Extortion. Unfortunately, nothing in the Code adequately covered bad check offenses, and experience soon demonstrated that such misdeeds could not be successfully prosecuted under no less than three separate provisions.[202] In 1961 Congress was in consequence required to amend the Code by adding article 123a.[203]

But the most ironical circumstance about Morgan as draftsman did not come to light until some years after the Code he had fashioned became law. Notwithstanding his 1919 strictures about the court-martial system then in effect, before the Senate Committee,[204] in a law review article,[205] and before a state bar association,[206] he published in the following year another law review article in which he supported—and justified—an extensive military jurisdiction over non-military persons.[207] He supported the constitutional validity of the

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[201]Dawkins v. Lord Rokeby, 4 Fost. & F. 806 (1866); Dawkins v. Lord Paulet, L. R. 5 Q. B. 94 (1869); Dawkins v. Lord Rokeby, L. R. 8 Q. B. 270 (1873), *aff'd*, L. R. 7 H. L. 754 (1875). Shortly afterwards, the High Court enjoined Dawkins from bringing further similar actions. Dawkins v. Prince Edward of Saxe Weimar, L. R. 1 Q. B. D. 499 (1876). At this time every Guards officer had double rank, viz., his rank in the Army at large was higher than his rank in the Guards regiment involved. Thus Captain Dawkins of the Coldstream Guards ranked as a Lieutenant Colonel in respect of all officers not holding Guards commissions. This striking discrimination was abolished during the time of Secretary of State for War Cardwell, the British army reformer of the 1870's. *See* R. Biddulph, Lord Cardwell at the War Office (1904).

[202]*See* Sen. Rep. No. 659, 87th Cong., 1st sess. (1961).

[203]Act of Oct. 4, 1961, Pub. L. 87-385, 75 Stat. 814.

[204]Establishment, *supra* note 98, at 1371-95.

[205]29 Yale L.J. 52 (1919).

[206]24 Md. St. Bar Ass'n Trans. 197 (1919), also in Establishment, *supra* note 98, at 1388-95.

[207]Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79 (1920).

recapture clause,[208] repeated in article 3(a), UCMJ, which in 1955 was struck down by the Supreme Court.[209] He also espoused a broad military jurisdiction over civilians who accompanied the forces overseas,[210] repeated in article 2(11), UCMJ, that in 1957 and again in 1960 the Supreme Court held unconstitutional.[211]

Professor Morgan had gone astray because he interpreted the "cases arising in the land and naval forces" clause of the fifth amendment as a grant of power. In his view, the determinative factor in every instance was where the particular case arose, not whether the individual on trial was a member of those forces.[212] Other subsequent authors applied the same test.[213] The only contrary view, expressed in Colonel Winthrop's 1896 treatise, was that the fifth "[a]mendment, in the particular indicated, is rather a *declaratory recognition and sanction* of an existing military jurisdiction than an original provision initiating such a jurisdiction."[214] Accordingly, Winthrop considered the then current recapture provision, Article of War 60 of 1874, to be unconstitutional,[215] and declared in italics that "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"[216] Thus in both areas the crowning paradox was that, whereas Professor Morgan had mordantly decried Colonel Winthrop's concept of a court-martial as intolerable,[217] an author whom Ansell had earlier denigrated as "first a military man,"[218] in the end it was that career military officer's perception of the Constitution's limitations on military power that ultimately prevailed over the rejection of those limitations by the lifetime professor of law.

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[208]*Id.* at 83-85.

[209]Toth v. Quarles, 350 U.S. 11 (1955).

[210]4 Minn. L. Rev. at 89-97.

[211]Reid v. Covert, 354 U.S. 1 (1957); Kinsella v. Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. Guagliardo, 361 U.S. 281 (1960).

[212]4 Minn. L. Rev. at 89-97.

[213]Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians*, 12 Calif. L. Rev. 75 (1924). In all fairness, the present author is bound to confess that, following the reasoning of both Colonel Underhill and Professor Morgan—the latter his erstwhile teacher—he also accepted the fallacy that the "cases arising in the land and naval forces" clause of the fifth amendment authorized military jurisdition over all such cases regardless of the accused's personal status. F. Wiener, A Practical Manual of Martial Law §§ 128-129 (1940).

[214]W. Winthrop, *supra* note 15, at *52-*53. *Accord*, Toth v. Quarles, 350 U.S. 11 (1955).

[215]W. Winthrop, *supra* note 15, at *144-*46.

[216]W. Winthrop, *supra* note 15, at *146.

[217]29 Yale L.J. at 66. Winthrop's view of a court-martial as an executive agency was, however, successfully invoked in the 1957 rehearing of Reid v. Covert (and Kinsella v. Krueger), 354 U.S. 1 (1957), not to argue that a court-martial was not a court, but simply to overcome the erroneous characterization of courts-martial as legislative courts in the first opinion in Kinsella v. Krueger, 351 U.S. 470 (1956).

[218]Establishment, *supra* note 98, at 123.

It is now time to review briefly the Uniform Code's principal new features. In many, perhaps in the bulk of its provisions, the new law followed the recently amended Articles of War, so that the Army and Air Force lawyer would need to learn only the major innovations, the minor changes, and the new numbering of the punitive articles.[219] But for those in the Navy and Marine Corps all was new, even the names of inferior tribunals. The Navy until 1951 had general, summary, and deck courts;[220] under the Code, the one second in line became a special court, the same as in the other services, and it was the former Navy deck court that became the Navy's new summary court.[221]

Major innovation number one was a civilian Court of Military Appeals, which was empowered to supervise, review, and set aside the findings and sentences adjudged by courts-martial.[222] This had been part of the Ansell plan in 1919.[223] Rejected then, the notion that the judgments of military and naval courts should be directly appealable to a civilian tribunal was adopted in the first half of the 1950's by every large English-speaking country: the United States in 1950, effective in 1951; [224] Great Britain in 1951, effective in 1952;[225] Canada in 1952;[226] New Zealand in 1953;[227] and Australia in 1955.[228] Otherwise stated, the common law world concluded, at virtually the same moment in time, that military justice was too vital to be entrusted only to judge advocates—just as the French had earlier expressed the view, whether first formulated by Talleyrand or by Clemenceau does not really matter, that war was too important to be left to the generals.

Major innovation number two was taking the law officer off the court and making him, in greater or less degree, a judge who would instruct the voting members of the court-martial.[229] This had also been part of the Ansell proposal,[230] but its immediate model was the

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[219]As the present author pointed out in his 1950 volume, The Uniform Code of Military Justice: Explanation, Comparative Text, and Commentary.
[220]*See* 34 U.S.C. § 1200 (1946) (Navy Articles governing Deck Courts).
[221]UCMJ art. 16.
[222]UCMJ art. 67.
[223]*See* Art. 52 of S. 64, 66th Cong., 1st sess.; Establishment, *supra* note 98, at 13-14.
[224]UCMJ art. 67.
[225]Courts-Martial (Appeals) Act of 1951, 14 & 15 Geo. VI ch. 46.
[226]National Defense Act of 1952, ch. 184, §§ 184, 190.
[227]Courts Martial Appeals Act 1953 (No. 104).
[228]Courts-Martial Appeals Act 1955 (No. 16).
[229]UCMJ arts. 26, 39, 51(b) and (c).
[230]*Supra* note 223.

British practice, dating from 1881, of requiring a judge advocate to advise all general courts-martial.[231]

Here was the Senate Committee's explanation for removing from the court the former law member, redesignated law officer by the Code:

> In view of the fact that the law officer is empowered to make final rulings on all interlocutory questions of law, except on a motion to dismiss and a motion relating to the accused's sanity, and under this bill will instruct the court upon the presumption of innocence, burden of proof, and elements of the offense, it is not considered desirable that the law officer should have the voting privileges of a member of the court. This is consistent with the practice in civil courts where the judge does not retire and deliberate with the jury.[232]

But a more revealing light was cast on the real motivation for this change by the Code draftsman, testifying before the House Committee:

> The law member, when he retires with the court, may make any kind of statement to them. And it has been stated—I would not say on how good authority—that frequently when he went back there he said, "Of course the law is this way but you fellows don't have to follow it."
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> . . . .
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> Now the law officer may become sort of a professional juryman, if they kept reappointing the same person, and as you probably know the professional jurymen are the convicting jurymen usually.
>
> If you kept getting the same jurymen all the time the number of convictions is very, very much greater than if you get a new jury.[233]

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[231] *See* Rule of Procedure 99(A), from the first such rules implementing the Army Act 1881, 44 & 45 Vict. ch. 58.

[232] *Establishing a Uniform Code of Military Justice*, S. Rep. No. 486, 81st Cong., 1st sess. 6 (1949).

[233] *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services on H.R. 2498*, 81st Cong., 1st sess. 607-08.

That second excerpt serves to explain the curious dualism that pervaded most of the post-World War II strictures leveled at the military code, one that indeed is all too characteristic of the later "Criminal Law Revolution" in the civilian courts, namely, the mixture of a desire to protect the innocent—the urge to do justice—with the countervailing desire to render more difficult conviction of the guilty —the urge to prevent justice.

There was a third major innovation in the Code, a provision for inter-service jurisdiction, which permitted courts-martial of one service to try and to punish men of other services.[234] This put an end to a virtual immunity that simply made no sense in an era of joint military operations.[235]

All of the other new features of the Code were changes in detail, duly spelled out in a tri-service volume, the *Manual for Courts-Martial, United States, 1951*. Both Code and *Manual* became effective on May 1st of that year, while hostilities in Korea were flagrant. In July 1953 the fighting in that far-off land would cease. But the fighting over the new military justice structure was only just beginning.

VI. MILITARY LAW PROBLEMS OF THE UNIFORM CODE'S FIRST DECADE—I

The first three judges of the Court of Military Appeals (CMA) created by the Uniform Code had, each of them, extensive military service in the Second World War and so were plainly familiar with the many aspects that differentiated a military community from one

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[234]UCMJ art. 17.

[235]*See, e.g.*, United States *ex rel.* Davis v. Waller, 225 Fed. 673 (E.D. Pa. 1915); AW 2(c) of 1916; and the famous (or infamous) case of "The Butcher of Samar"—the identical respondent, Major L.W.T. Waller, U.S.M.C. *See* J. Schott, the Ordeal of Samar (1965).

Briefly, believing that he was carrying out the specific orders of his superior, Brigadier General Jacob H. ("Hell Roaring Jake") Smith, U.S.A., Major Waller in 1901 ordered that eleven Filipino carriers accompanying his command be shot without trial. For this he was charged with murder under AW 58 of 1874. He pleaded to the jurisdiction because he had been relieved from attachment to the Army and returned to Navy command before the charges had been preferred. The court sustained the plea, but the commanding general overruled the court and ordered the trial to proceed. Major Waller was acquitted, after which TJAG held that the jurisditional plea should have been sustained—but no record of that ruling appears in the Dig. Op. JAG 1912. Later, General Smith was convicted of giving the order, which at the Waller trial he had denied having given; was convicted; was sentenced to a reprimand; and was then retired by the President.

purely civilian.[236] Not at all surprisingly, their decisions reflected substantial doctrinal inconsistency, but their supervision of military justice as conducted in all three armed forces did enable them to remedy the most egregious abuses that appeared. Here are, up to 1962, seven instances that can fairly be classified as "worst cases," in each of which the conviction had been affirmed by a service board of review.

1) At the time in question, the Navy proceeded in this case with a permanent general court-martial, presided over by a flag officer. When challenged, the admiral admitted that "[w]hen I see him come in there, I know he is generally guilty otherwise he wouldn't be here"—and this was the officer who made out fitness reports on his fellow court members. The challenge was not sustained, and the case passed by Navy board of review, but it was reversed by the CMA.[237]

2) In another Navy case, the president of a special court-martial was consistently ruling in favor of the defense. At a recess he was relieved and another officer substituted in his place. The resultant conviction was affirmed by a Navy board of review but reversed by the CMA.[238]

3) This case involved an Air Force special court, sitting in England. The accused retained as defense counsel an English solicitor, who of course had a right of audience before an American court-martial. Thereupon the convening authority appointed two lawyer officers to the court, who advised its president to overrule every one of the solicitor's objections. The conviction was affirmed by an Air Force board of review but reversed by the CMA.[239]

4) Although the accused was charged with a capital offense, he was allowed only a single day to prepare for trial. He was convicted and sentenced to death. That sentence was approved by an Army board of review but of course reversed by the CMA.[240]

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[236]Chief Judge Robert E. Quinn had been Governor of Rhode Island and a Judge of its Superior Court; during World War II he had served as a Captain, USNR. Judge George W. Latimer, a Justice of the Supreme Court of Utah when appointed to the CMA, had as a Colonel been Chief of Staff of an Army Infantry Division in the Pacific. Judge Paul W. Brosman, a Professor and Dean at Tulane University Law School, had served as a Lieutenant Colonel in the Army Air Forces.

[237]United States v. Deain, 17 C.M.R. 44 (C.M.A. 1954).

[238]United States v. Whitley, 19 C.M.R. 82 (C.M.A. 1955).

[239]United States v. Sears, 20 C.M.R. 377 (C.M.A. 1956).

[240]United States v. Parker, 19 C.M.R. 201 (C.M.A. 1955).

5) This case involved another soldier accused of a capital offense, who was defended by a JAGC major. But, although the evidence on premeditation was very thin, this defense counsel made no closing argument. Following conviction, when the court was required to consider whether the sentence should be death or life imprisonment, defense counsel said nothing in mitigation. That death sentence was approved by an Army board of review but reversed by the CMA.[241]

6) Accused was charged with assault with intent to commit sodomy, but his victim professed not to remember the attack. At this point the law officer, trial counsel, staff judge advocate, and the convening authority worked together—"conspired" would be an accurate description—to persuade the victim to testify. Ultimately he did, and the conviction that resulted was affirmed by an Army board of review. It was reversed by the CMA.[242]

7) Here defense counsel, an Army lieutenant, made a spirited defense, the consequence of which was that his superior, the staff judge advocate, gave him a low efficiency report. An Army board of review, notwithstanding those facts, passed the case. Once again, the CMA reversed the conviction.[243]

Cases such as the foregoing, each one of which had been scrutinized but not set aside within the services, demonstrated to a certainty the necessity for some nonservice agency to police the military justice system. And, in the perception of over 500 members of the Congress, there was a further (and perhaps even more compelling) reason for continuing the then novel CMA. With that tribunal sitting, there was no longer any need for the people's elected representatives to intercede with the armed forces, or its civilian secretariat, or even with the President, on behalf of influential constituents' misbehaving relatives. It was amply sufficient to advise such essential supporters that all of their kin's substantial rights would be sympathetically considered by that wholly civilian CMA. Consequently, whatever deficiencies in that tribunal's rulings could be pointed out, by legal and military critics alike, its overriding virtue was that its very existence removed every member of both House and Senate from further participation in the court-martial business.

All of the "worst cases" listed above involved the actuality of "command influence," specifically denounced by article 37 of the

[241]United States v. McMahan, 21 C.M.R. 31 (C.M.A. 1956).
[242]United States v. Kennedy, 24 C.M.R. 61 (C.M.A. 1957).
[243]United States v. Kitchins, 31 C.M.R. 175 (C.M.A. 1961).

Code, violation of which constituted an offense under article 98. In the nearly forty years since the Code went into effect, there has only been a single prosecution under article 98.[244]

Complaints of error on the other side were even more numerous. There was particularized and persuasive testimony concerning untenable rulings by the CMA from the retired Judge Advocate General of the Air Force, who, holding that office for twelve years, had operated under three separate systems of military justice: the 1920 Articles of War; the Elston Act; and the Uniform Code. Major General Reginald C. Harmon told a Senate Committee that, since the CMA began functioning, form had been elevated over substance in many instances, and that convictions had been set aside for reasons that to the average person seemed to have little to do with either the fairness of the trial or the protection of an accused's fundamental rights. He supplied a list of seventeen cases in support of his strictures.[245]

In one of those instances, the CMA refused to follow a provision in the presidentially-prescribed *Manual for Courts- Martial*, which declared that, in any case where a dishonorable discharge had been adjudged and approved, the accused was automatically reduced to the lowest enlisted grade.[246] The CMA's ruling in that case was proved wrong by two later events. First, the Court of Claims subsequently denied a petition for back pay that rested on the assertion that such a reduction was erroneous.[247] Second, Congress promptly amended the Code by adding article 58a, which restored the *Manual* provision that the CMA had invalidated.[248]

The CMA also struck down another part of the President's *Manual*, the provision stating that "[i]f the continuation of absence without proper authority is much prolonged, the court may be justified in inferring from that alone an intent to remain absent permanently." An instruction based on that language was first held to constitute

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[244]H. Moyer, Justice and the Military § 3-361 (1972) (in the section covering "Command Influence").

[245]*Constitutional Rights of Military Personnel: Hearings before the Subcommittee on Constitutional Rights, Senate Committee on the Judiciary*, 87th Cong., 2d sess. 170-75 (1962).

[246]United States v. Simpson, 27 C.M.R. 303 (C.M.A. 1959).

[247]Johnson v. United States, 150 Ct. Cls. 747, 280 F.2d 856 (1960), *cert. denied*, 365 U.S. 882 (1961).

[248]Act of July 12, 1960, Pub. L. 86-633, 74 Stat. 468. It is necessary to distinguish art. 58(a), originally enacted in 1950, from art. 58a, added in 1960.

reversible error in a case involving an absence for seventeen days.[249] Application of the same rationale to an instance where the accused had been away for six months evoked a dissent,[250] but later the dissenting judge concurred in reversing a conviction where the absence had lasted over four and a half years where other mistaken instructions had been involved.[251] But the climax to this series of rulings was reached in a case where the accused had absented himself from a combat area in France in 1944 and was not returned to military control until twelve years later, in 1956. The Court of Military Appeals held that the resultant conviction required reversal because the law officer had failed to instruct on the lesser included offense of absence without leave![252]

Thus, by the late 1950's and early 1960's, the principal disadvantage of a military appellate court had become all too apparent. Yet that same prime drawback had been presciently pointed out four decades earlier. Here is what Brigadier General Walter A. Bethel, judge advocate of the Allied Expeditionary Force, had told an earlier Senate Committee in 1919:

> [O]f course there is bound to be an error now and then which ought to be corrected. Now, the only thing that I fear in the matter of a court of that kind is that it will draw to itself too much power, try to find error where really no substantial error exists. That will be the tendency, I fear.[253]

Needless to say, the services were extremely unhappy with what the CMA was doing. Not only were their own actions in the area of military justice being supervised from outside, as they had never previously been since George Washington had been selected by the Continental Congress to command its forces, but also the law officer of the general court-martial had been fashioned into a federal judge,[254] and all members of such a tribunal were prohibited from ever again looking at a *Manual for Courts-Martial* while sitting.[255] In actual fact, not only emotionally, but also in resorting to administrative separations of undesirable personnel in the face of the obstacles thrown up by the CMA, the armed forces were actually on strike against the Uniform Code.

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[249]United States v. Cothern, 23 C.M.R. 382 (C.M.A. 1957).
[250]United States v. Burgess, 23 C.M.R. 387 (C.M.A. 1957).
[251]United States v. Saccio, 24 C.M.R. 287 (C.M.A. 1957).
[252]United States v. Swain, 24 C.M.R. 197 (C.M.A. 1957).
[253]Establishment, *supra* note 98, at 583.
[254]Miller, *Who Made the Law Officer a Federal Judge?*, 4 Mil. L. Rev. 39 (1959).
[255]United States v. Rinehart, 24 C.M.R. 212 (C.M.A. 1957).

That attitude unhappily impaired irrevocably the fate of a generally thoughtful report submitted by a committee of nine general officers appointed in October 1959 by Secretary of the Army Wilber M. Brucker to study the operation of the Uniform Code and its effect on good order and discipline in the Army.[256] Completed and published a year later, and known as the Powell Report after its president, Lieutenant General Herbert B. Powell, two of its recommendations were so extreme that the entire document emerged stillborn.

This was an unfortunate outcome, for the Powell Report reflected much careful and sensible thought. It recommended an end to military jurisdiction over retired personnel,[257] the very omission that had resulted in President Wilson's veto of the 1916 Articles of War as originally enacted,[258] yet a head of power that a distinguished and knowledgeable military lawyer later recommended for abolition in articulated terms.[259] The Powell committee also urged trials by a general court-martial composed solely of the law officer,[260] an innovation that was ultimately adopted by the Military Justice Act of 1968.[261]

The Powell committee further recommended legislative amendments to cure the unhappy consequences of decisions by the CMA that authorized sentences to confinement unaccompanied by dismissal.[262] Of what possible military use could such an officer be after his release from confinement? It is my information that this unhappy condition has never been remedied.

The committee recommended against limiting trials by court-martial to military offenses only in time of peace and conferring upon the civil authorities the primary right of jurisdiction in respect of civil offenses.[263] That was the thrust of legislation sponsored by the American Legion.[264]

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[256]Report to Honorable Wilber M. Brucker, Secretary of the Army, by the Committee on the Uniform Code of Military Justice, Good Order and Discipline in the Army (18 January 1960) [hereinafter Powell Report].

[257]Powell Report, *supra* note 256, at 8d, 175, 180.

[258]*Id.*

[259]J. Bishop, Justice Under Fire 66-79 (1974). Unfortunately, the author of this superb volume, Richard Ely Professor of Law at Yale and a retired judge advocate AUS colonel, died prematurely in 1985.

[260]Powell Report, *supra* note 256, at 5, 108-09.

[261]Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335, 1335.

[262]Powell Report, *supra* note 256, at 6, 130-32, 138-39.

[263]Powell Report, *supra* note 256, at 9-10, 203-04.

[264]H.R. 3455, 86th Cong., 1st sess.; Powell Report, *supra* note 256, at 218-39.

Unfortunately, that veterans' group never dealt with the vice in the existing Code, which eliminated the exception included in the 1916, 1920, and 1948 versions of Article of War 92, an exception that withdrew from military jurisdiction "murder or rape within the geographical limits of the States of the Union and the District of Columbia in time of peace." General Crowder had in 1916 disagreed with the General Staff when it proposed an "extension of jurisdiction of courts-martial to capital crimes committed within" those limits, and had persuaded both the Secretary of War and the Congress to adopt his view.[265] The drafters of the Code, however, supremely confident of the total perfection of their handiwork, considered such an exception unnecessary.[266] But the American Legion failed to pinpoint that narrow but significant extension of jurisdiction effected by the Code, which in consequence was never addressed by the Powell committee.

Consideration on their merits of the bulk of the Powell committee's recommendations was actually rendered impossible by the extreme nature of its proposals on harmless error and on the composition of the CMA. Both of the latter were characterized in the committee's report as "Improvements for Stability."[267]

The first proposal concerned the harmless error doctrine, designed to minimize the percentage of reversals in criminal cases on the ground of errors in the course of a trial that did not curtail in any degree the substantial rights of the accused; it was not written into the federal Judicial Code until 1919.[268] Here also military law had blazed the trail. Article of War 37 of 1916, reenacted in 1920 and left untouched in 1948, provided against disapproval of court-martial proceedings in whole or in part "on the ground of improper admission or rejection of evidence or for any error as to any matter of pleading or procedure unless in the opinion of the reviewing or confirming authority, after an examination of the entire proceedings, it shall appear that the error complained of has injuriously affected the substantial rights of the accused." The same standard was carried forward by article 59(a) of the Code: "A finding or sentence of a court-martial shall not be held incorrect on the ground of an error

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[265]Sen. Rep. No. 130, 64th Cong., 1st sess.

[266]UCMJ art. 14. But a 1955 agreement between the Departments of Defense and of Justice restored much of the substance of AW 74 of 1916 through 1948. For its present version, see Appendix 3 of MCM, 1984.

[267]Powell Report, *supra* note 256, at 193, 194-95.

[268]Act of Feb. 19, 1919, ch. 48, 40 Stat. 1181; *see* the discussion of that measure's background in Kotteakos v. United States, 328 U.S. 750 (1946).

of law unless the error materially prejudiced the substantial rights of the accused."

That standard proved insufficient to satisfy the committee appointed by Secretary Brucker; here was its proposed revision of the Code's article 59(a): "An error of law . . . will not be considered to materially prejudice the substantial rights of an accused unless, after consideration of the entire record, it is affirmatively determined that a rehearing would probably produce a materially more favorable result of the accused."[269] Or, otherwise stated, even the gross unfairness of a trial, even a trial that was mob-dominated like the one struck down in *Moore v. Dempsey*,[270] would not result in reversal just so long as the accused's guilt was clear. It hardly needs to be suggested that this was a literally fantastic definition of harmless error.

The Powell committee also proposed to reinforce the existing CMA, composed of three civilian judges serving staggered terms of fifteen years and eligible for reappointment, by adding two retired military lawyers who would serve shorter terms: "Two judges shall be appointed for four years from among the retired commissioned officers of the armed forces, who have completed 15 consecutive years service on active duty as a judge advocate of the Army or Air Force or as a legal specialist of the Navy within two years of their appointment."[271]

Here was a court-packing plan more crass and more blatant than the one that President Franklin Roosevelt had urged for the Supreme Court in 1937, more than twenty years earlier. All too obviously, the inclusion of that recommendation infected the entire Powell Report and condemned it for all time. It is really a pity that no single member of the Powell committee, especially its lawyer members, possessed a sufficient sense of fairly recent history to be aware of that damning analogy.

The immediate result of the publication of the Powell Report, not at all surprisingly, was to widen the existing breach between the members of the CMA and the three service Judge Advocates General, to such an extent that the Code committee, consisting of those six individuals and directed by article 67(g) of the Code to submit an annual report to the Congress, did not do so in 1960, the year in which the Powell committee's report was published.

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[269]Powell Report, *supra* note 256, at 194, 197.
[270]261 U.S. 86 (1923).
[271]Powell Report, *supra* note 256, at 194, 198-99.

VII. MILITARY LAW PROBLEMS OF THE UNIFORM CODE'S FIRST DECADE—II

However much the services may have differed with the Court of Military Appeals during the first decade of the Uniform Code's operation, there was one issue on which they were completely united: all of them at every level insisted that military jurisdiction extended to all civilians accompanying American armed forces overseas.

Some of the court's opinions on this question extended beyond the emotional to the shrill,[272] nor did that tribunal refrain, not once but on three separate occasions, from announcing its views on the jurisdictional question even while that precise issue was *sub judice* in the Supreme Court of the United States.[273]

As for the services, the details of their positions varied from time to time, even to the extent of complete contradiction from one oc-

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[272]United States v. Burney, 21 C.M.R. 98, 121 (C.M.A. 1956):

> Conceding we are not in a state of declared war, our foreign armies may be likened to the Army garrisons in the far west during the days of the Indian wars. They must be prepared to fight at the drop of a bomb, and their state of readiness depends upon control over those who contribute to the success of their operations. Camp followers in those days were considered a necessary part of a military expedition, and the military and political leaders of this country have concluded that civilian technicians form a vital segment of our overseas operations.

Compare Dig. Op. JAG, 1880, at 384, ¶ 4; *id.*, 1895, at 599-600, ¶ 4; *id.*, 1901, at 563, ¶ 2023:

> A post trader is not, under the Act of 1876, and was not under that of 1867 and 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp-follower in time of peace, and the only military jurisdiction to which a camp-follower may become subject is that indicated by the 63d Article of War, *viz.* one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1876, in providing that such post traders shall be 'subject to the rules and regulations for the government of the army,' render them amendable to trial by court-martial in time of peace . . . If . . . the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular Article applicable to civilians employed in connection with the Army, *viz.* Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court-martial if employed in the theatre of an Indian war, as persons serving with an army in the field in the sense of that Article, they cannot be made so liable when not thus situated . . . .

[273](1) Reid v. Covert, 350 U.S. 985 (1956) (jurisdiction postponed, March 12, 1956); Kinsella v. Krueger, 350 U.S. 986 (1956) (certiorari granted, March 12, 1956); United States v. Burney, 21 C.M.R. 98 (C.M.A. March 30, 1956). (2) Kinsella v. Krueger, 351 U.S. 470 (1956), and Reid v. Covert, 351 U.S. 487 (1956), argued May 3, 1956 (J. Sup. Ct., Oct. T. 1955, at 230-31), and decided June 11, 1956; United States v. St. Clair, 21 C.M.R. 208 (C.M.A. May 25, 1956). (3) Rehearing in *Covert* and *Krueger* cases granted, 352 U.S. 901 (November 5, 1956); United States v. Rubenstein, 22 C.M.R. 313 (C.M.A. January 25, 1957); decision on rehearing, Reid v. Covert, 354 U.S. 1 (June 10, 1957).

casion to the next. In the end, the services lost every point for which they had contended, and the Court of Military Appeals was reversed in respect of every jurisdictional case that reached the civil courts. As is well known, the ultimate conclusion of the Nation's highest court was that, in time of peace, no civilians could legally be tried by court-martial, whether they were dependents or employees, whether they were accused of capital or noncapital offenses.[274]

Thus, interestingly enough, although the Solicitor General had argued in the earliest of these cases that "the world about which Colonel Winthrop wrote no longer exists,"[275] the ultimate outcome of all the litigation was approval of the italicized assertion made by Lieutenant Colonel William Winthrop, Deputy Judge Advocate General, just sixty-four years earlier: "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"[276]

In view of the present writer's personal participation in five of the six cases that reached the Supreme Court, the particularized doctrinal questions involved will not be belabored at length.[277] Instead, earlier discussions of those questions will be incorporated by reference, so that what follows is primarily chronological connective tissue.[278] But it is well to note that the ultimate result had early been foreshadowed.

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[274]Jurisdiction sustained, United States v. Smith, 17 C.M.R. 314 (C.M.A. 1954), then struck down, Kinsella v. Krueger, 354 U.S. 1 (1957); jurisdiction sustained, United States v. Covert, 19 C.M.R. 174 (C.M.A. 1955), then struck down, Reid v. Covert, 354 U.S. 1 (1957); jurisdiction sustained, United States v. Dial, 26 C.M.R. 321 (C.M.A. 1958), then struck down, Kinsella v. Singleton, 361 U.S. 234 (1960); jurisdiction sustained, United States v. Grisham, 16 C.M.R. 268 (C.M.A. 1954), then struck down, Grisham v. Hagan, 361 U.S. 278 (1960); jurisdiction sustained, United States v. Wilson, 25 C.M.R. 322 (C.M.A. 1958), then struck down, Wilson v. Bohlender, 361 U.S. 281 (1960); jurisdiction sustained, United States v. Guagliardo, 25 C.M.R. 874 (A.F.B.R. 1958), *pet. denied*, 26 C.M.R. 516 (C.M.A. 1958), then struck down, McElroy v. Guagliardo, 316 U.S. 281 (1960).

[275]Appellant's brief, Reid v. Covert, No. 701, Oct. T, 1955, at 44.

[276]W. Winthrop, *supra* note 15, at *146.

[277]On behalf of Mrs. Covert, before the Air Force board of review, the CMA, the U.S. District Court, and the U.S. Supreme Court. On behalf of General Krueger, in the U.S. District Court, the Fourth Circuit, and the U.S. Supreme Court. On behalf of Mrs. Singleton, Grisham, and Wilson, in the U.S. Supreme Court.

[278]For a complete doctrinal discussion, see Civilians, *supra* note 7, at Appendix IV, pp. 305-14: "Rise and Fall of the American Jurisdiction over Civilians Acccompanying the Forces Overseas in Time of Peace." For the text of the Petition for Rehearing in the *Covert* and *Krueger* cases, see the present author's Briefing and Arguing Federal Appeals, § 173, at 432-40 (1961). For an outline of the issues argued on rehearing in those cases, see *id.* § 47 at 137-41. For prevailing counsel's oral peroration on rehearing, see *id* § 216 at 335-37. For a frankly subjective view of the problems of advocacy involved in that rehearing, see the present author's *Persuading the Supreme Court to Reverse Itself*, 14 Litigation 6 (Summer 1988).

On March 26, 1946, a long-time professional sailor, Chief Petty Officer Harold E. Hirshberg, received an honorable discharge at the Brooklyn Navy Yard. He re-enlisted on the afternoon of the next day. Thereafter it was discovered that, while a prisoner of war in Japanese hands after the fall of the Philippines, he had abused and maltreated fellow prisoners. He was tried on nine specifications and convicted on only two. Thereafter he sought—and obtained—habeas corpus in U.S. District Court, on the ground that his honorable discharge had relieved him from military amenability for any and all acts committed during the enlistment terminated by that discharge.[279]

The Second Circuit reversed twice, once on the first argument, then also on rehearing. It analogize Chief Hirshberg's position to that of an individual committing a crime in Canada, going to the United States, and then returning to Canada; in that situation there could be no doubt of Canadian jurisdiction.[280] But the Supreme Court once more reversed, on the ground that, as always held by the Army, and as also held by the Navy prior to 1932, a discharge terminated all military jurisdiction over any offenses committed prior to discharge.[281]

This result sufficiently disturbed Congress that it amended the law. After all, how could the officer at the Brooklyn Navy Yard who had signed the discharge possibly know what Hirshberg had or had not done in the three years that he spent in Japanese captivity? And the fact that Hirshberg had not been convicted of all the offenses charged against him was persuasive indication that the court-martial hearing his case had been discriminating and not simply swayed by the nature of the accusations made.

Accordingly, with the *Hirshberg* case specifically mentioned in both Committee reports,[282] Congress provided in article 3(a) of the Uniform Code that

> any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement for five years or more and for which that person cannot be tried in the courts of the United

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[279]United States v. Malanaphy, 73 F. Supp. 990 (E.D.N.Y. 1947).
[280]United States v. Malanaphy, 168 F.2d 503 (2d Cir. 1948).
[281] Hirshberg v. Cooke, 336 U.S. 210 (1949).
[282] H.R. Rep. No. 491, 81st Cong., 1st sess. 11; Sen. Rep. No. 486, 81st Cong., 1st sess. 8.

States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial[283] by reason of the termination of said status.

This new and distinctly limited recapture clause was soon put to the test. Airman Robert W. Toth had, following service in Korea, duly received an honorable discharge. Soon afterwards it was discovered that he had participated in the premeditated murder of a Korean civilian, for which both of his accomplices had already been tried and punished.[284] When he was then arrested by the Air Force in the United States and returned to Korea for trial by court-martial in respect of his part in that killing, a U.S. District Court first directed that he be returned to Washington,[285] and the court then ordered his release.[286]

The Court of Appeals reversed,[287] only to be reversed in turn by the Supreme Court,[288] which had heard two arguments in the matter—and had apparently rejected its own first impression; the ultimate dissenting opinion was undoubtedly originally written on behalf of the Court.[289] Thus Toth literally got away with murder. But, doctrinally, the decision in his case destroyed the view then nearly universally held by military lawyers that the "cases arising in the land and naval forces" clause of the fifth amendment constituted a source of military jurisdiction regardless of the military status of the accused. Thus Winthrop's views, which as has been indicated ran counter to later professional consensus,[290] finally won vindication from the Supreme Court.

Soon that outstanding military lawyer's views would once again be tested. Mrs. Clarice B. Covert, wife of Master Sergeant Edward E. Covert, U.S.A.F., living with him and their two children on an

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[283]"Courts-martial" as enacted in 1950, "court-martial" as codified in 1956.

[284]United States v. Schreiber, 18 C.M.R. 226 (C.M.A. 1955); United States v. Kinder, 14 C.M.R. 742 (A.F.B.R. 1954).

[285]Toth v. Talbott, 113 F. Supp. 330 (D.D.C. 1953).

[286]Toth v. Talbott, 114 F. Supp. 468 (D.D.C. 1953).

[287]Talbott v. Toth, 215 F.2d 22 (D.C. Cir. 1954).

[288]Toth v. Quarles, 350 U.S. 11 (1955).

[289]For the order directing reargument, see 349 U.S. 949 (1955). It is clear from internal evidence that what became the dissenting opinion (350 U.S. at 23-24) was originally written as the opinion of the Court, as it recites the travel of the case (pp. 24-26), matter that normally appears at the outset of an opinion for the Court. Moreover, the controlling passage in the ultimately prevailing opinion—"The Fifth Amendment . . . does not grant court-martial power to Congress"—appears only in a footnote (350 U.S. at 14 n.5). If that passage had reflected a view originally held by a majority of the Court, it would of course have been given a more prominent position.

[290]*See supra* note 275 and accompanying text.

American base in England, was convicted by an Air Force court-martial of killing him. The only contested issue concerned her mental responsibility, and that had been determined by the terms of a joint Army-Air Force manual, *Psychiatry in Military Law*.[291] She was convicted of premeditated murder, sentenced to life imprisonment, and sent to the Federal Reformatory for Women in Alderson, West Virginia. A divided Air Force board of review affirmed,[292] only to be reversed by a similarly divided Court of Military Appeals.[293]

Pursuant to the latter ruling, a rehearing was ordered, and Mrs. Covert, having meanwhile been sent to the District of Columbia jail, awaited a second trial by court-martial at Bolling Air Force Base in the District on November 26, 1955.[294] But before that rehearing could commence, she also filed, just ten days after the Supreme Court had decided Toth's case, a petition for habeas corpus. There relief was granted, because Judge Edward A. Tamm interpreted that decision to mean that "a civilian is entitled to a civilian trial."[295]

Mrs. Covert was not the only overseas service wife recently tried and convicted by court-martial of killing her husband. There was another, Dorothy Krueger Smith, daughter of General Walter Krueger (Commanding General, Sixth Army, in World War II), and married to Colonel Aubrey Smith, U.S.A.; both were in Japan at the time. In her case also the only contested issue was her mental capacity; in her case also that question was determined by the joint service manual on *Psychiatry in Military Law*; in her case also her sentence to life imprisonment was affirmed by the board of review;[296] and in her case also the final military determination was made by a divided Court of Military Appeals. But there was this vital difference: in her case that last ruling was adverse.[297]

Following the decision in Mrs. Covert's case, General Krueger as relator brought a similar habeas corpus proceeding on behalf of his daughter in the Southern District of West Virginia, as she was then confined at Alderson. But Judge Ben Moore refused to follow Judge

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[291]Dep't of Army Training Manual 8-240, Dep't of Air Force Reg. 160-42, Psychiatry in Military Law (Sept. 20, 1950).

[292]United States v. Covert, 16 C.M.R. 465 (A.F.B.R. 1954).

[293]United States v. Covert, 19 C.M.R. 174 (C.M.A. 1955).

[294]R. 2, 8, 122, 123, Reid v. Covert, No. 701, Oct. T. 1955.

[295]*Id.* at 132.

[296]United States v. Smith, 10 C.M.R. 350 (A.B.R.), *aff'd upon reconsideration*, 10 C.M.R. 350 (A.B.R. 1953).

[297]United States v. Smith, 17 C.M.R. 314 (C.M.A. 1954).

Tamm's ruling, after which General Krueger appealed to the Fourth Circuit.[298]

Inasmuch as the government had already appealed the *Covert* judgment to the Supreme Court, it sought certiorari prior to judgment in the *Krueger* proceeding, so that the two cases could be heard together.[299]

And so they were, only to be decided adversely to both women in June 1956, in an opinion by Justice Clark that declined to consider whether the military jurisdiction being sustained fell within the constitutional power of Congress "To make Rules for the Government and Regulation of the land and naval Forces."[300] Chief Justice Warren and Justices Black and Douglas noted their disagreement, indicating that the time was too short for the preparation of a dissenting opinion. Justice Frankfurter reserved decision, stating that he had not yet been able to reach a conclusion on the central issue presented.

A petition for rehearing was filed and, to most observers' amazement, granted in November 1956;[301] after all, the Court's rules clearly stated that no such petition would be granted "except at the instance of a justice who concurred in the judgment or decision and with the concurrence of a majority of the court."[302] Obviously, one member of the earlier majority had developed doubts about his earlier vote.

Accordingly, both cases were set down for rehearing in February 1957. Following oral argument, and just 364 days after the first decisions, those earlier opinions were "withdrawn."[303] There was a plurality opinion by Justice Black, to the effect that there could be no military jurisdiction in time of peace over any civilians. Two separate opinions, by Justices Frankfurter and Harlan, limited that ruling to civilian dependents charged with capital offenses. And Justice Harlan, who had been with the majority the year before, frankly explained why he now believed the earlier holding to have been untenable. Justice Clark, who had written that earlier opinion, wrote a distinctly heated dissent, joined by Justice Burton, who had concurred in the first opinion.

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[298]Krueger v. Kinsella, 137 F. Supp. 806 (S.D. W. Va. 1956).

[299]Under 28 U.S.C. § 1254(1) (1982), it is open to the party prevailing below to seek certiorari prior to judgment in the Court of Appeals.

[300]Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956).

[301]352 U.S. 901 (1956).

[302]Supreme Court Rule 58(1) of 1954.

[303]Reid v. Covert and Kinsella v. Krueger, 354 U.S. 1 (1957). The word "withdrawn" appears in the headnote of the official report.

The Supreme Court had, for the first and up to now only instance in its history, reached a different result in the same litigation following a published opinion, and without a controlling change in its membership.[304] This was because, even if the Court in June 1957 had been constituted just as it had been in June 1956, the result would still have been different.[305] The operative fact was that one member of the first majority had, on further reflection, arrived at a diametrically altered conclusion.

In retrospect, even with full advantage of more than thirty years' hindsight, nothing in the way that Mrs. Covert and Mrs. Smith were treated at any level of the military justice system can possibly add up to a compelling demonstration in favor of a general criminal jurisdiction over civilian dependents. Neither instance involved even the whisper of a triangular relationship. Both concerned two women who were emotionally disturbed to a high degree. Mrs. Smith had been under psychiatric treatment for a number of years; was even then on barbiturates and paraldehyde pursuant to prescription; and had been told that, if once more hospitalized, she would be evacuated to the States. Mrs. Covert, by the overwhelming testimony of the psychiatric experts unhampered by their reading of the service manual, had actually been psychotic when she killed her husband.

If both women had been tried in any American civilian court, state or federal, they would either have been acquitted, or, at the most severe, sentenced to a few years' imprisonment for manslaughter. But the Army with the blessing of the Court of Military Appeals upheld Mrs. Smith's conviction for premeditated murder and a sentence to life imprisonment. And the Air Force board of review, despite the post-trial affidavits by three psychiatrists who had testified at the trial, and in the face of the fact that, while confined in Alderson, Mrs. Covert had given birth to a third child, insisted that

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[304]In the Income Tax case of the 1890's (Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), 158 U.S. 601 (1895)), there was no published opinion after the first hearing, the Court having been equally divided. In a number of Jehovah's Witnesses cases in the 1940's, the later difference in result was a consequence of the replacement of Justice Byrnes by Justice Rutledge.

[305]In 1956 the majority was composed of Justices Clark, Reed, Burton, Minton, and Harlan; Chief Justice Warren and Justices Black and Douglas dissented; Justice Frankfurter reserved judgment. If there had been no changes in the Court's membership in the year that followed, there would still in June 1957 have been five votes to release the two women: Chief Justice Warren and Justices Black, Frankfurter, Douglas and Harlan. Even though Justice Brennan had replaced Justice Minton, and Justice Reed had been succeeded by Justice Whittaker (who however did not take his seat in time to participate in the rehearing), those changes in personnel did not control the later change in result.

"[a]nything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted."[306]

By the time that the Court of Military Appeals reversed her conviction in June 1955, Mrs. Covert had been in confinement since March 1953. Yet the Air Force soon thereafter ordered a rehearing, so that she could be tried again.[307] After her release on habeas corpus, and after the Supreme Court's reversal in June 1956 of the earlier grant of the writ, she sought a stay of mandate pending the timely filing of her petition for rehearing.

Even in the face of the infinitesimal viability of such applications, the Air Force opposed, giving her a choice of confinement in a jail or in an asylum: she could return to the District of Columbia jail, or else she could go to St. Elizabeth's Hospital, where her mental condition three-and-a- half years earlier could once more be explored. In fact, the stay was granted over the Solicitor General's opposition. Finally, during the pendency over the Supreme Court's summer vacation of the petition for rehearing, plea bargaining feelers were extended on her behalf. But the Air Force insisted that there could be no credit for prior confinement, and that no evidence of her mental status could be introduced.[308] This was indeed hardball with a vengeance.

Once both women were irrevocably released, the questions left open by the 1957 ruling were squarely posed by a quartet of new cases heard at the Court's 1959 Term. *Kinsella v. Singleton*[309] concerned a civilian dependent convicted of a noncapital crime; *Grisham v. Hagan*[310] concerned a civilian employee found guilty of a capital offense; and the other two, *McElroy v. Guagliardo* and *Wilson v. Bohlender*,[311] concerned civilian employees tried and convicted by court-martial of noncapital crimes.

In *Reid v. Covert II* the Government had answered the questions posed by the Court in granting the rehearing by stating (as did the two women) that there was no difference for purposes of court-martial jurisdiction between capital and noncapital offenses or be-

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[306]16 C.M.R. 465, 504 (A.F.B.R. 1954).
[307]R. 122, Reid v. Covert, No. 701, Oct. T. 1955.
[308]Author's personal knowledge.
[309]361 U.S. 234 (1960).
[310]361 U.S. 278 (1960).
[311]361 U.S. 281 (1960).

tween civilian dependents and civilian employees.[312] Accordingly, it failed to seek review of several rulings that construed *Reid v. Covert II* broadly.[313] Not only that, but also in *Wilson v. Girard*,[314] the government succeeded in establishing its power to waive jurisdiction over a full-fledged soldier stationed in Japan and to turn him over to the Japanese authorities for trial by them. But, by the time the four new cases were heard, the government's position had changed to "let's see if we can't get *Reid v. Covert* limited."

Notwithstanding the change of position, however, military jurisdiction was struck down in each of the four later cases. In every one of them, military jurisdiction (except in a time and place of military operations or occupation) was held to depend on the military status of the accused. Thus the plurality views expressed by Justice Black in *Reid v. Covert II* had become the opinion of the Court. And in *Guagliardo* the Court went on to say that, if it was indeed a matter of necessity to subject the armed services' civilian employees to military jurisdiction, then the solution was to incorporate such employees into those services, as the Navy had done with its Construction Battalions—the Seabees—in World War II.[315]

It will not occasion surprise that, just as in 1956 and again in 1957, the 1960 rulings on the scope of military jurisdiction failed to generate judicial unanimity. Justices Whittaker and Stewart were of the view that, while civilian dependents were not subject to trial by court-martial, civilian employees were. Accordingly they concurred in

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[312] "For purposes of court-martial jurisdiction, there is no valid distinction between civilians employed by the armed forces and civilian dependents," Point ID, Supplemental Brief for Appellant [Reid] and Petitioner [Kinsella] on Rehearing at 37-40. "The constitutional distinction between major crimes and petty offenses is not a relevant distinction for purposes of court-martial jurisdiction over civilians in foreign territory." Point IV, *id.* at 82-95.

"There is no constitutional difference between civilian employees and civilian dependents in time of peace." Point IV E. Supplemental Brief on Rehearing on Behalf of Appellee [Covert] and Respondent [Krueger] at 157-59; "There is no constitutional distinction, with respect to court-martial jurisdiction, between major crimes and petty offenses," Point IV F, *id.* at 159-60.

[313] (1) United States *ex rel.* Louise Smith v. Kinsella, H.C. No. 1963, S.D. W.Va. (civilian dependent convicted by court-martial of noncapital offense released on habeas corpus; no appeal). (2) Cynthia M. Tyler, CM 396739 (unreported) (holding by Army board of review that conviction of civilian dependent for capital offense could not be sustained even when convening authority had ordered case treated as noncapital for depositions pursuant to UCMJ art. 49(f); case not certified to CMA under UCMJ art. 67(b)(2)). (3) Cheaves v. Brucker, H.C. No. 100-58, D.D.C. (woman charged with noncapital offenses, released from military custody on habeas corpus, thereafter turned over to authorities of Federal Republic of Germany and tried in a German court).

[314] 354 U.S. 524 (1957).

[315] McElroy v. Guagliardo, 361 U.S. 281, 286-87 (1960).

Singleton but dissented in *Grisham*, *Guagliardo*, and *Wilson*. Justices Frankfurter and Harlan adhered to the capital/noncapital distinction that each had formulated in *Reid v. Covert II*. Consequently they concurred in releasing *Grisham* but would have denied relief to *Singleton*, *Guagliardo*, and *Wilson*.

What was surprising, however,—less surprising than downright astonishing—was that each of the Court's 1960 opinions was written by Justice Clark. This was the same individual who had authored the first *Krueger* and *Covert* opinions in June 1956, who had dissented from the grant of rehearing in November 1956, and who had then angrily dissented in *Reid v. Covert II*. Indeed, if Justice Clark had adhered to his original views, a majority of the Court would have sustained court-martial jurisdiction in the two cases dealing with civilian employees convicted of noncapital offenses.

Why then did Justice Clark abandon his earlier and strongly held pro-military position? The only explanation at all tenable is that this was his way of getting even with Justice Harlan for running out on him in *Reid v. Covert II*. And that interpretation gains force from the tenor of Justice Clark's opinion for the Court in *Singleton*, which reads like a calculated and articulated assault on Justice Harlan's 1957 formulation of his capital/noncapital dichotomy. Certainly a rereading of the prevailing *Singleton* opinion conveys the strong impression that Justice Clark was "sticking it to" Justice Harlan and that he enjoyed doing so.

Doctrinally, of course, there is little to be said for the capital/noncapital difference, inasmuch as successive military codes for years had empowered commanders exercising court-martial jurisdiction to declare capital cases noncapital and to refer such cases to courts that lacked the power to adjudge capital sentences.[316] The first step was often taken to enable the prosecution to use deposition testimony, the second to deal with sleeping wartime sentinels in peaceful rear areas. As has been noted, both sides in *Reid v. Covert II* had agreed that there was no distinction between the two classes of cases. Justices Clark *et al.*, in voting to deny rehearing, said in respect of the Court's question regarding "[t]he relevance, for court-martial jurisdiction over civilian dependents in time of peace, of any distinctions between major crimes and petty offenses," that the answer thereto "is obvious."[317]

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[316]UCMJ arts. 19 and 49(f); R.C.M. 201(f) (2) (A) (iii) (b) and 201(f) (2(C) (ii).
[317]352 U.S. 901, 902 (1956).

Unfortunately, the simple and completely workable test, that military jurisdiction was coextensive with military status, did not long survive—although just the other day it was once more restored. In 1969, when dissent against the war in Vietnam was strong and articulate among those members of the academic community who had been and were being deferred from the military draft, the Supreme Court decided *O'Callahan v. Parker*.[318] Petitioner there was a serviceman convicted by court-martial of attempted rape on a civilian in an off-base motel. The Court, speaking through Justice Douglas, and emphasizing that safeguards under both the fifth and sixth amendments were at stake, came up with the view that, as a prerequisite to the exercise of military jurisdiction, it must first be established that the offense was service connected. Holding the crime for which O'Callahan was convicted was not so connected, he was set free. The vote was 5-3, as Justice Fortas, who would undoubtedly have joined the majority, had resigned from the Court nineteen days before the decision came down, once it had been revealed that he had committed the "high misdemeanor"[319] of practicing law while still on the bench.

The Court's opinion made no mention of the circumstance that the specific terms of the fifth amendment plainly made indictment by grand jury inapplicable to members of the armed forces, nor that such members had never since the beginning had the slightest claims to trial by petty jury. Indeed, with characteristic inconsistency, Justice Douglas failed even to cite his own unanimous opinion in *Whelchel v. McDonald*,[320] where, in the case of a serviceman convicted for rape of a civilian, it was plainly and emphatically held that those in the military service did not have, and never had, any right whatsoever to a jury trial.

A few years later, in *Relford v. Commandant*,[321] the Court undertook to establish criteria for "service connection," and thereafter refused to apply the *O'Callahan* doctrine retroactively.[322] "Nevertheless," as the present author wrote in 1974, "the *O'Callahan* decision still need[ed] to be overruled as the aberration that it was and is."[323] And, in June 1987, in large measure because of the difficulties and inconsistencies in applying the "service connected" criteria,

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[318]395 U.S. 258 (1969).
[319]28 U.S.C. § 454 (1982).
[320]340 U.S. 122 (1950).
[321]401 U.S. 355 (1971).
[322]Gosa v. Mayden, 413 U.S. 665 (1973).
[323]Wiener, Book Review, 59 Corn. L. Rev. 748, 756-57 (1974).

overruled it was (*Solorio v. United States*).[324] Here again, the decision was not unanimous, and the dissent, which repeated all of Justice Douglas's *O'Callahan* arguments, was badly disfigured by the anti-military shriek with which it concluded. It is hardly necessary to add that the *Solorio* dissent did not undertake to examine the earlier Douglas opinion in *Whelchel v. McDonald*.[325]

This being the anniversary of the effective date of an English statute, it will not be inappropriate to inquire how civilians accompanying British forces outside of Britain have been treated over the years.

Research subsequent to the American 1960 decisions discussed above showed that, first, prior to the close of the War for American Independence, authoritative British rulings had denied peacetime military jurisdiction over civilians, both employees and dependents,[326] just as the U.S. Supreme Court did in 1957 and in 1960.

Second, it demonstrated that there had been grave contemporary doubts in London regarding the exercise of military jurisdiction over civilians present in territory under military occupation, such as the British Army exercised in Canada from 1759 to 1763, and again in the American cities that they held from 1775 to 1783.[327] That power, following many earlier decisions, was fully sustained by the U.S. Supreme Court in *Madsen v. Kinsella*,[328] decided in 1952.

Third, such research also showed that, when the Deputy Judge Advocate of the British garrison on the island of Minorca inquired in 1777 whether the civilian employees of ordnance there could be rendered amenable to military law, the Judge Advocate General in London replied that, if such persons "are desirous of being considered as Military, and be alike Subject to discipline and trial by Courts Martial," they should be incorporated into the armed forces[329]—precisely the answer that the U.S. Supreme Court gave 183 years later in *McElroy v. Guagliardo*.[330]

It should therefore not occasion surprise that, by the time the last quarter of the nineteenth century was reached, prevailing British

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[324]483 U.S. 435 (1987).
[325]340 U.S. 122 (1950).
[326]Civilians, *supra* note 7, at 23-164, chaps. II-VI.
[327]*Id.*
[328]343 U.S. 341 (1952).
[329]Civilians, *supra* note 7, at 77.
[330]361 U.S. 281, 286-87 (1960).

and American opinion was identical in respect of military jurisdiction over accompanying civilians. Such individuals were only amenable to trial by courts-martial of the U.S. Army if they were "in the field," or by those of the British Army if they were "on active service."[331]

But halfway through the twentieth century, British law on the matter was in need of change. Up to then, civilians with forces not on active service in Egypt or Iraq could be dealt with by British consular courts sitting there, while civilians with the forces that occupied the British Zone of Germany after the Second World War were clearly "on active service." At that point, the ancient system of extraterritoriality in Near Eastern countries was about to be abandoned, while the occupation of Germany would soon be terminated. Both the Bonn Conventions and the NATO Status of Forces Agreements assumed that every military force serving on the soil of an associated power had plenary military jurisdiction over its own accompanying civilians.

Trial of such civilians by court-martial was deemed by Parliament to be preferable to permitting British subjects to be tried by foreign courts, particularly since this was precisely what at this point the American forces did with their civilians. That American military jurisdiction had first been legislated in 1916, and for nearly forty years afterward it had never been seriously questioned. Accordingly, similar military jurisdiction was conferred on British Forces by the Army Act 1955 and the Air Force Act 1955. Both measures were scheduled to go into effect on January 1, 1957. But, ironically, on November 5, 1956, a little less than two months earlier, the U.S. Supreme Court's grant of rehearing in the *Covert* and *Krueger* cases foreshadowed the end of the precise American military jurisdiction on which Parliament drew when it adopted those last two enactments.

The actual impact of the new British legislation appears to have been minimal for its first dozen or so years, however great its deterrent effect may have been. But by the mid-1970's it was felt that, by and large, the court-martial structure was not wholly suited to

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[331]In order to avoid a multiplicity of essential collateral citations, the discussion at this point and up to 1977—the effective date of the Armed Forces Act of 1976—will simply incorporate by reference two portions of Civilians, *supra* note 7: Ch. X, pp. 227-43 ("The Army and Air Force Acts 1955"), and App. IV, pp. 305-14 ("Rise and Fall of the American Military Jurisdiction over Civilians Accompanying the Forces Overseas, a Jurisdiction Advisedly Copied in the Army and Air Force Acts 1955").

dealing with accompanying civilians, particularly if they happened to be youthful offenders.

The fact was that the military legal system was simply not fully equipped to deal with accompanying civilians, in part because of its powers of sentencing, which were primarily directed at service personnel committing military offenses, in part because of its traditional mode of trial. Those deficiencies became more marked as the number of accompanying civilians grew. What was needed was an augmented range of sentences for dealing with such civilians, resembling those available to civil courts in the United Kingdom. Also needed, obviously, was a new type of court, more closely akin to magistrates' courts in England and Wales.

Accordingly, the Armed Forces Act 1976[332] provided an additional range of sentences for civilians being tried, with particular emphasis on young offenders, and it established a tribunal completely new to the military legal system, the Standing Civilian Court (SCC). Full details, some of which are necessarily complex, appear in the 1977 *Civilian Supplement* to Part I of the current *Manual of Military Law.*[333] What follows is simply a generalized summary of the new provisions.

First, the "appropriate superior authority" (ASA) may exercise summary jurisdiction, with power to adjudge a fine of up to one hundred pounds. In the face of such an exercise of summary jurisdiction, the individual accused may elect trial by court-martial but he cannot elect to be tried by a SCC.

The SCC is constituted by a magistrate sitting alone, except in cases involving juveniles (where every accused being tried is under seventeen at the time of the offense), where the magistrate may sit with up to two members or assessors. A member votes on finding and sentence, and an assessor has no vote and only advises the magistrate. The magistrates are members of the Judge Advocate General's judicial staff specifically appointed as magistrates of SCC's by the Lord Chancellor. The SCC is a permanent tribunal which, unlike a court-martial, does not need to be resworn before each trial. There are currently two designated SCC areas, one for West Germany, Belgium, and Holland, the second for Berlin. No SCC may sit in the United Kingdom.

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[332]1976 ch. 52.

[333]The Civilian Supplement is dated April 1977; the current Manual of Military Law is the 12th edition, 1972, as changed through 1987.

The prosecutor before a SCC must be an officer subject to military law; the defending officer may be a civilian Crown servant. The proceedings are not recorded verbatim.

If the accused is convicted, a SCC may adjudge confinement up to six months and a fine not to exceed two thousand pounds, but for a civilian offense no punishment may exceed that which could be adjudged by a magistrate's court in England or Wales.

Since the Armed Forces Act of 1981,[334] a SCC has new powers in respect of persons suffering from mental disorders and in relation to safety orders for children in need of care and control. And the Armed Forces Act of 1986[335] permits the place of safety originally designated to be varied.

An accused convicted by a SCC may appeal either the conviction or the sentence alone. If the directing officer who first sent the case to the SCC for trial does not grant relief, the matter is referred to a court-martial. If the appeal is against the conviction, the matter is treated as a rehearing; if it is against sentence alone, it is dealt with by the court-martial as though it had just found the accused guilty. A judge advocate must always be appointed to an appellate court-martial, whether it is a general court-martial (GCM) or a district court-martial (DCM). The appellate court-martial may only award a sentence that a SCC could adjudge, but it may, if circumstances warrant, adjudge a more severe sentence as long as it does not exceed prescribed maximum limits.

If trial by court-martial is originally elected by the accused, or if he appeals his conviction or sentence to a court-martial, the convening authority may, if he desires, appoint a civilian Crown servant to sit as a member (but not as president) of such court-martial, one for a DCM, two for a GCM.

Ever since 1952 any individual convicted by court-martial could appeal his conviction directly to a civil court, the Courts-Martial Appeal Court (CMAC), and, since 1966, from the CMAC to the House of Lords. Those provisions were subsequently reformulated in the Courts-Martial (Appeals) Act of 1968.[336]

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[334]1981 ch. 55.
[335]1986 ch. 21.
[336]1968 ch. 20. Details are made available in the current Manual of Military Law, Part I, ch. IV ("Appeals from Courts-Martial").

The right of appeal from a court-martial to the CMAC is the same in the case of a civilian as in that of a serviceman, with only a few differences. A civilian accused may appeal against his sentence (unless it is one fixed by law), but a serviceman may not; and "sentence" in this connection includes an order for reception, custody, or compensation made against him. A person who has been fined or ordered to pay compensation to the parent or guardian of a civilian accused has an independent right to appeal against the making of the order.

The same right of appeal to the CMAC is afforded to the civilian who has been convicted by a court-martial on appeal from the SCC and to a person who, on appeal to a court-martial from the SCC, has been fined or ordered to pay compensation as parent or guardian of a juvenile offender.

It hardly needs to be added that all of the foregoing tribunals and procedures, enacted since 1976 by the omnicompetent Parliament of the United Kingdom of Great Britain and Northern Ireland, are completely beyond the constitutional power of the Congress of the United States.

VIII. LEGISLATIVE RESTRUCTURING, LEGISLATIVE OVERRULINGS

The final chronological segment of American military law includes episodes both strange and drastic. Congress radically altered the structure of military justice and, in completing the process, corrected a number of untenable holdings that the CMA had handed down. But in this same period of the mid-1970's, Congress rejected extreme proposals in the military law area that reflected the divisions in the community at large over hostilities in Vietnam. Contemporaneously the Supreme Court similarly refused to accept the anti-military arguments that were pressed upon it. Indeed, within the last two years, the Supreme Court overruled its own earlier decision, both difficult and confusing to apply in practice, that had limited military jurisdiction over military personnel to offenses that were "service connected."[337]

As tempers on both sides cooled following publication of the ill-advised Powell Report, consensus over needed improvements to and

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[337] *See supra* notes 318-25 and accompanying text.

changes in the Uniform Code developed and grew.[338] The result was the Military Justice Act of 1968,[339] which, although effecting major changes, produced satisfaction in virtually all quarters. Here were its major features:

1) The law officer was renamed the military judge, and his powers were expanded, thus confirming the results of a long decisional process.[340]

2) Next, trials by special and general courts-martial before a military judge alone were authorized, this upon the request of the accused without more.[341] Currently about three-quarters of all trials by special and general courts proceed before a military judge sitting without court members.[342]

3) Where the military judge sits separately from the members of the court, he can no longer, as originally authorized, meet privately with the members to assist them in framing findings.[343] All such discussions must take place in open court and be recorded.[344]

4) Before any special court-martial may adjudge a bad conduct discharge, counsel on both sides must be legally trained, and a military judge must be present.[345]

5) The Army's independent field judiciary system, which forever insulated the former law officer from any control whatsoever by the appointing authority, was made mandatory for all three services.[346] The Navy had experimented with that same system on its own, but the Air Force never did. The familiar Air Force shibboleth, "We're different," a sentiment particularly vocal among its nonflying personnel, was sufficient to doom that innovation as long as choice over whether or not to adopt it was still available.[347]

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[338]Ross, *The Military Justice Act of 1968: Historical Background*, 23 JAG J. 125 (169); Mil. L. Rev. Bicent. Issue 273 (1975).

[339]Military Justice Act of 1968, Pub. L. 90-632, 82 Stat. 1335 [hereinafter Military Justice Act of 1968].

[340]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1336. *See* H.R. Rep. 1481, 90th Cong., 2d sess.; Sen. Rep. 1601, 90th Cong., 2d sess.

[341]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1335.

[342]*See Military Justice Statistics*, The Army Lawyer, Feb. 1988, at 54. The exact figures for judge alone cases are: GCM, 71.2%; BCDSPCM, 78.4%; SPCM, 65.8%.

[343]UCMJ art. 26(b), as originally enacted.

[344]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1337, 1339.

[345]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1335-36.

[346]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1336.

[347] *See* Wiener, *The Army's Field Judiciary System: A Notable Advance*, 46 A.B.A.J. 1178 (1960).

6) Prior to 1968 it could authoritatively be stated that "[b]ail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case."[348] Thus bail is not even indexed in Winthrop's text. But the new act allowed the military judge to entertain motions after referral of the case from the accused, a provision that the appellate courts later used to give the judge the power to release an accused from pretrial confinement. Further, in another section the new act provided for the convening authority's deferral of post-trial confinement.[349]

7) Boards of review with jurisdiction over the more serious cases had first been given a statutory basis by the Army's 1920 Article of War 50½. The Uniform Code made them mandatory for all three armed forces. In 1968 Congress redesignated them Courts of Military Review,[350] an upgrading process wholly familiar. Thus, the Board of General Appraisers, first created in 1922,[351] had been transformed four years later into the United States Customs Court.[352] More than half a century after that, this tribunal was redesignated the United States Court of International Trade.[353] Similarly, the Board of Tax Appeals, initially established in 1924,[354] became, thanks to section 7441 of the Internal Revenue Code of 1954, the Tax Court of the United States. Fifteen years later, it too was renamed; today it is the United States Tax Court.[355]

8) The first branch office of the Army's Judge Advocate General was organized in 1918, to do for court-martial cases arising in the Allied Expeditionary Force in France what General Order No. 7 of that year had provided for those originating in the United States.[356] Article of War 50½ of 1920 codified this practice, authorizing the President to establish such offices in "distant commands." In World War II, the Army accordingly had branch offices of TJAG in no less than five overseas theaters: European; North African (later Mediterranean); Southwest Pacific; Central Pacific; and China-Burma-India. The same authority was continued in article 50(*c*) of 1948, and it was made applicable to all three services by article 68 of the Uniform

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[348]Dig. Op. JAG, 1912, at 481, ¶ IC.

[349]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1338, 1341 *see* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305 (j) analysis, app. 21, at A21-17.

[350]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1341-42.

[351]Act of Sept. 21, 1922, ch. 356, § 518, 42 Stat. 859, 972.

[352]Act of May 28, 1926, ch. 411, § 13, 44 Stat. 669.

[353]Act of Oct. 10, 1980, Pub. L. 96-417, § 101, 94 Stat. 1727.

[354]Act of June 2, 1924, Title IX, ch. 234, 43 Stat. 253, 336.

[355]Act of Dec. 30, 1969, Pub. L. 91-172, § 901, 83 Stat. 487, 730.

[356]*See* Establishment, *supra* note 98, at 959-78 (Branch Office, JAGO, A.E.F., 1918).

Code. The 1968 Act transferred the power of creating branch offices to the service Secretaries, thus relieving the President of that additional duty.[357] (In actual fact, of course, virtually all orders reading "By direction of the President" never got near the White House.)

9) The provision for a new trial based on evidence outside the record of the first trial, first extended by Article of War 53 of 1948 and continued by article 73 of the Uniform Code, was broadened in two respects. First, the period for petitioning for such relief, one year after approval of the original sentence as first enacted, was extended to two years. And second, the accused became entitled to seek this remedy regardless of the scope of the sentence involved.[358] Earlier provisions had limited this remedy to cases of death, dismissal, dishonorable discharge (and bad-conduct discharge after 1951), and at least one year's confinement.

10) Finally, Congress overruled one of the CMA's least tenable recent decisions, the holding that the presentation of a generalized and wholly informal lecture on military justice amounted to unlawfully influencing the action of a court-martial in violation of the Code's article 37. That, said the Congress, was plainly wrong.[359]

Passed at the height of conflict in Vietnam, the obvious improvements effected by the Military Justice Act of 1968 failed either to silence or to deter all those whose disapproval of that armed strife led them to denounce everything military. Unfortunately, the disagreement that divided the nation for years on end had its source in the misguided policy, emanating from the highest quarters, as to who should bear the burdens of and risk the dangers of participation in those hostilities.

The armed forces deemed necessary to carry on the pending struggle were raised by conscription, a means by then no novelty in American history. It had been employed by both sides in the Civil War; by a reunited nation in both of the World Wars; and, once again, during the Korean conflict. But, as in the latter instance, there had been no declaration of war to recognize the Vietnam warfare. Such a step would surely have evoked more support among the people or, as in 1917, would have enabled the mobilization of all the arts and

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[357]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1342.

[358]Military Justice Act of 1968, *supra* note 339, 82 Stat. at 1343.

[359]Military Justice Act of 1968, § 2(13) (overruling CMA holding that a general lecture on military justice was deemed a violation of art. 37; citation not given in committee report).

pressures of modern propaganda to popularize a conflict that had originally left many citizens both disinterested and dispassionate.

Perhaps, as in 1950 to 1953 during the fighting in Korea, such a formal step would not have been essential had the obligation of military service been equitably distributed. During hostilities in Vietnam that obligation was anything but uniform. The provision for student deferment, available just so long as the exempted person maintained passing grades, enabled that individual to avoid military service, not only through all of college but also during his post-graduate study, at the completion of which he might in any event be too old to be called.

Another shellproof dugout in the Vietnam years could be found in the reserve components of the armed forces. Both National Guard and reserves had become subject to active federal duty in 1940, fifteen or so months before Pearl Harbor.[360] During Korea many National Guard units and a host of persons in the reserves of all three forces were ordered to active duty. But in the Vietnam era service in any reserve component constituted a virtual guarantee of safety from hostile fire.

The student deferment and the reserve components' immunity from lethal confrontation constituted, without question, the most serious affront to civic morality since the provision in the Civil War draft act that enabled anyone to evade military duty who could pay three hundred dollars to a substitute to perform such duty in his place.[361]

This unfair and indefensible shifting of the burden necessarily infected the academic community nationwide. Students there were safe from being shot at, while thousands unable for whatever reason to attend institutions of higher learning were being maimed or killed. Not at all surprisingly, the students—and their teachers—rationalized their own safety: they were not serving because the conflict was an immoral and/or an unjust war. The consequences of this fatal disunity have not yet been completely dissipated.

Here is what one professor in an undoubtedly first-rate university pointed out in 1970:

It is fair to state that the original opposition to the war in Viet-

[360] *See supra* notes 165-66 and accompanying text.
[361] Act of Mar. 3, 1863, ch. 75, § 3, 12 Stat. 731, 733.

> nam began within this country's intellectual and academic community and its main thrust has remained within this grouping. Moreover, as the antiwar movement has expanded and accelerated, it has come to impugn the very legitimacy of military service. . . .
>
> In the cinema and on stage, military characters have achieved the status of buffoons or grotesque malefactors. The disestablishment of the ROTC on prestige campuses continues apace. . . . A minor industry exists in the production of books and lectures castigating the military mind, the Pentagon and GI butchers.
>
> The military has come to be portrayed as the *bete noire* of American society. . . . It would not be too far afield to say that antimilitarism has become the anti-Semitism of the intellectual community, . . . the new rage in the intellectual fashion world.[362]

Antimilitarism became evident in numerous areas. It infected a widely circulated book entitled *Military Justice is to Justice as Military Music is to Music*, which reflected ignorance, error, bias, and above all hatred—not too strong a word—of everything military. It criticized the Supreme Court for sustaining the existence of the armed forces and for not adopting the author's lay reading of the Constitution, one that would have reduced them to impotent debating societies. Indeed, that volume was actually "the literary equivalent of burning an ROTC building."[363] A later critic, also better acquainted with constitutional and military law, subsequently characterized the book, succinctly but with complete accuracy, as "ignorant and dishonest."[364] But perhaps needless to say, that work when it appeared in 1970 was hailed as a great revelation by some leading journalistic members of the Disloyal Opposition.[365]

A number of contemporary legislative proposals reflected comparably insensate antimilitarism. Thus, a series of eleven bills introduced in August 1970 by one senator would among other things have separated all military justice functions from commanders and mandated that at least half of the membership of general courts-

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[362]Professor C.C. Moskos of Northwestern Univ., *Military Made Scapegoat for Vietnam*, Washington Post, Aug. 30, 1970.

[363]Wiener, *The Founding Fathers Were Far Wiser Than the Robert Sherrills of Today*, Army, July 1970, at 58.

[364]Bishop, *The Case for Military Justice*, 62 Mil. L. Rev. 215 (1973). This lecture, expanded into book form, became J. Bishop, Justice Under Fire: A Study of Military Law (1974).

[365]*Military Justice on Trial*, Newsweek Aug. 31, 1970.

martial be composed of members of the same rank and grade as the accused[366] (shades of the late ex-general S.T. Ansell and his 1919 plan to have privates try privates!).[367] Among other proposals, conduct unbecoming an officer and a gentleman and all offenses under the general article could only be punished nonjudicially. All nonmilitary offenses committed within American territory, such as, for example, barracks-room larceny on a military installation, could only be tried in federal civilian courts. And such courts would also be empowered "to grant appropriate relief" whenever any serviceman claimed a denial of his constitutional rights or of those similarly situated under the free speech clause of the first amendment. Indeed, one of the eleven bills in question went so far as to forbid the seating of court-martial members according to rank, an arrangement universal in every civilian appellate court in the country, from the Supreme Court of the United States down.[368]

In the same month, a comprehensive revision of the Uniform Code was introduced by the late Senator Birch Bayh of Indiana, one proposing to create a "Court-Martial Command" that would forever have separated military justice from military command at every level.[369] The plan presented by this proposal doubtless reflected the personal view of one of his constituents, who over the years had carved out a career for himself by inveighing in print against virtually every aspect of military law.[370] For present purposes, it is sufficient to say that the comprehensive defects of the Bayh proposal were subsequently dissected and exposed, in surgical fashion, by Major General Kenneth J. Hodson, a former TJAG.[371]

Obviously, those legislative proposals were so extreme as to be self-defeating. But they faithfully reflected the contentions then being asserted during the progress of two cases that presented "the strange if not indeed incredible spectacle of Army officers on active duty invoking the Constitution to justify public contempt of the President and willful disobedience of orders as a means of manifesting opposition to the Commander in Chief's course in the Vietnamese conflict."[372]

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[366]S. 4168 to S. 4178, 91st Cong., 2d sess. (Aug. 4, 1970), 116 Cong. Rec. 27216-23.

[367]*See supra* notes 142-43 and accompanying text.

[368]S. 4176, 91st Cong., 2d sess., 116 Cong. Rec. 27222.

[369]S. 4191, 91st Cong., 2d sess. (Aug. 6, 1970), 116 Cong. Rec. 27678-95.

[370]Professor Edward F. Sherman of Indiana Univ.; *see* Index to Legal Periodicals beginning with 1968.

[371]Hodson, *Military Justice: Abolish or Change?*, 22 Kans. L. Rev. 31 (1973); Mil. L. Rev. Bicent. Issue 579 (1975).

[372]Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357 (1968).

The anti-hero of the first of these instances was Second Lieutenant Henry Howe, who, while on active duty, carried a picket sign denouncing President Johnson for "facist agression." An ROTC graduate, his shortcomings in English spelling appeared to have been waived by the institution that conferred the baccalaureate degree upon him. He was charged with, and convicted of, conduct unbecoming an officer under article 133, and of using "contemptuous words" against the President in violation of article 88. He contended, but quite without success, that the latter provision violated the first amendment.[373]

Anti-hero number two—perhaps he is unjustly being denied priority, as all his contentions were reached and ultimately rejected by the Supreme Court—was Captain Howard Levy of the Medical Corps. He was charged with, and convicted of, disobeying a lawful order to train enlisted men and of making numerous disloyal statements to them, such as advising them to disobey any orders that would send them to Vietnam.

At every stage in his legal marathon, which Professor Bishop called "the Jarndyce v. Jarndyce of military law,"[374] Captain Levy asserted not only that all of his statements were protected by the first amendment, but also that the general military articles that he had been convicted of violating were unconstitutionally vague.[375]

The latter argument was actually accepted by numerous civilian courts, including the courts of appeals for two federal circuits. But in the end, it was flatly repudiated by the Supreme Court, first in his own case, *Parker v. Levy*,[376] and then in *Secretary of the Navy v. Avrech*.[377] But it is symptomatic of the contemporary judicial climate that the final rulings reversed two separate circuits, and that in the first and controlling decision cited, the majority to sustain the constitutional validity of the general military articles—which ironically were pre-constitutional[378]—was only 5-3.

The arguments *pro* and *con* on the applicability of the void-for-vagueness doctrine to render those articles invalid were set forth at length twenty years ago, and need not be repeated here.[379] At this

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[373]United States v. Howe, 37 C.M.R. 429 (C.M.A. 1967).
[374]J. Bishop, *supra* note 364, at 51 n.42.
[375]Eight separate rulings are collected in J. Bishop, *supra* note 364, at 51 n.42.
[376]417 U.S. 733 (1974).
[377]418 U.S. 676 (1974).
[378]AW XLVII of 1775 and Sec. XIV, Art. 21, of 1776 (conduct unbecoming); AW L of 1775 and Sec. XVIII, Art. 5, of 1776 (conduct to the prejudice).
[379]*See* Wiener, *supra* note 372.

juncture it is sufficient to point out that, in *Parker v. Levy*, the Supreme Court explicitly held that "the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs."[380] After all, when the Sherman Act denounces combinations "in restraint of trade," is that prohibition any more specific than "conduct unbecoming an officer and a gentleman" or "all disorders and neglects to the prejudice of good order and discipline in the armed forces"?

The article that included the clause last quoted was, over the years, always a favorite target of every anti-military orator, invariably labeled as "the devil's article" because of its broad sweep and obvious inclusiveness.[381] Not at all surprisingly, that hackneyed denunciation appeared in the very earliest pages of the 1400-page hearings held in 1919 on the revision of the Articles of War.[382] But in the *Levy* case the accused could not have had the slightest doubt, either that it was wrong to urge the enlisted men he was required to train to refuse to obey orders requiring them to serve in Vietnam, or that counseling enlisted men to disobey orders was indeed conduct unbecoming an officer.

When, a little later, the Supreme Court reversed the District of Columbia Circuit in the *Avrech* case, solely "on the authority of *Parker v. Levy*,"[383] Mr. Justice Douglas concluded his dissent in the second ruling with the words, "The steps we take in *Parker v. Levy* . . . and in this case are backward steps measured by the standards of an open society."[384] The short but wholly proper response to that sentiment is that no armed force is, or possibly can be, "an open society." If it were, it would be only an armed mob.

It is fair to say that the *Levy* and *Avrech* decisions marked a return to a more realistic judicial approach to the position of an armed force in a free and open civilian society, because those rulings were followed by another trio, each of them decided in favor of the military contentions being made—and each of them, like the first two, involving reversal of the court of appeals whose decision was being reviewed.

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[380]417 U.S. at 756.
[381]W. Winthrop, *supra* note 15, at *1118-*19, citing Clode, M.L., *supra* note 9, at 12, 18, 40.
[382]Major J.E. Runcie, Establishment, *supra* note 98, at 37.
[383]418 U.S. at 678.
[384]418 U.S. 676, 678, 681 (1974).

The first of these was *Schlesinger v. Councilman*,[385] decided in March 1975. The accused, a captain, was charged with having sold, transferred, and being in possession of marijuana. Contending that the offenses alleged were not "service-connected," he obtained from a federal district court an injunction against the prosecution of further court-martial proceedings against him. The Tenth Circuit affirmed, only to be reversed by the Supreme Court. That tribunal declared in ringing terms that no federal court was empowered to interfere, by injunction or otherwise, with pending court-martial proceedings.

The second case, decided just a year later, was *Greer v. Spock*.[386] This case held that, notwithstanding arguments resting on the untrammelled scope of free speech, the commander of a military reservation was empowered to ban political speeches and demonstrations on his installation. Plainly, any other result would gravely have endangered the nonpolitical stability that is essential to the effectiveness of an armed force.

The final case, *Middendorf v. Henry*,[387] dealt with the question whether an accused before a summary court-martial was entitled to counsel or, otherwise stated, whether such a proceeding was a "criminal prosecution" within the meaning of the sixth amendment. Under the Uniform Code, a summary court-martial was—and is—empowered to adjudge a sentence of up to one month's confinement.[388] Plainly, any accused incarcerated over such a period would indeed feel that he had been successfully prosecuted for a criminal offense. But after hearing two arguments, a majority of the Supreme Court determined that, as a realistic matter, it would not do to turn the simple summary court procedure (identical with the Navy's pre-1951 deck court) into an adversary proceeding with counsel on both sides. As Captain and Brevet Colonel Oliver Wendell Holmes, late of the 20th Massachusetts Volunteers, wrote in 1881 on the first page of his ultimately classic treatise on *The Common Law*, "The life of the law has not been logic: it has been experience."

But, however much the Supreme Court may have sustained the military services' positions in the mid-1970's, for the stated and perfectly obvious reason that a military society differs from a civilian one, the Court of Military Appeals during that same period moved

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[385]420 U.S. 738 (1975).
[386]424 U.S. 828 (1976).
[387]425 U.S. 25 (1976).
[388]UCMJ art. 20.

in a wholly different direction. The latter tribunal frankly—and actively—undertook to "civilianize" military justice.[389] Indeed, its Chief Judge in 1978 announced to the American bar that military discipline and military justice were not only divisible, but also that the line between the two was manifestly drawn between the summary and the special court-martial: nonjudicial article 15 action and summary courts-martial involved military discipline, while special and general courts-martial pertained to military justice.[390]

Was there anything in the Uniform Code to support that newly generated revelation? Perhaps I may be permitted to repeat my own comments on that then recent discovery—or invention:

> Article 15 of the Code permits most minor miscreants to escape nonjudicial punishment by demanding trial by court-martial. Article 20 further entitles an accused to refuse trial by summary court-martial. Consequently, if the military boundary between justice and discipline is actually located above the summary and below the special court, then every minimal offender other than the maritime mischief-maker—the "member attached to or embarked on a vessel"—can by his own unilateral and unreviewable act, remove himself from the lowly levels of military discipline and enter upon the rarified uplands of military justice.[391]

In other words, starkly but with absolute accuracy, this newly devised vision as to the line of severance between military discipline and military justice was, because it flew into the face of the Code's provisions, completely mistaken. To the best of my knowledge, no one since has ever sought to resurrect that particular fantasy.

Unfortunately, while that anti-military attitude prevailed in the CMA, it led to a number of indefensible decisions. One was a ruling that the President's power to prescribe rules of procedure for courts-martial, expressly conferred by article 36(a) of the Code and carrying forward what had been in Article of War 38 since 1916, did not

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[389]Fletcher, *Where the Court of Military Appeals is Going in the COMA Evolution*, Federal Bar Ass'n annual convention (Sept. 30, 1977); Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43 (1977).

[390]Fletcher, address at Mid-Year Meeting of Am. Bar Ass'n, New Orleans, LA, Feb. 12, 1978.

[391]Wiener, *Advocacy at Military Law: The Lawyer's Reason and the Soldier's Faith*, 80 Mil. L. Rev. 1, 19 (1978).

extend to post-trial procedure.[392] Another decision held that recruiter misconduct so far rendered an enlistment void *ab initio* that it destroyed military jurisdiction over the soldier.[393]

This time dissatisfaction with the course of CMA rulings was not limited to individuals writing for the *Military Law Review* or addressing legal audiences. This time Congress acted, expressly amending the Code to overrule those decisions.

Section 801(a) of the Department of Defense Authorization Act of 1980 amended article 2 of the Code by stating in a new subsection (b) that any voluntary enlistment is valid for purposes of jurisdiction, and in a new subsection (c) Congress set out the elements of what had always in the past been recognized as constructive enlistment.[394]

Section 801(b) of the same measured amended article 36(a) of the Code to expand the original word "Procedure"—certainly sufficiently broad to appear all-inclusive to its draftsmen and to all affected by it, from 1916 through 1950 and until 1975. But to overrule the CMA decision that had read "Procedure" too narrowly, Congress substituted the words "Pretrial, trial and post-trial procedures."[395]

The new provisions just set forth were, in the Senate Report on the bill, labeled "Amendments to Improve Military Discipline."[396] Advocates of the process of "civilianizing military justice" would do well to ponder the distinctly unvarnished congressional comments on the necessity of overruling the CMA with those amendments.[397]

At about this time, Congress also rendered unlawful the unionization of the armed forces.[398] It is difficult to understand how any unionized army could possibly have been militarily effective, inasmuch as its members, instead of being obliged to obey one chain of masters, their military superiors, would now be subject to a second and likely conflicting set of commands emanating from union representatives. Unfortunately, the Department of Defense's views on the proposal to ban unions in the military dealt with that matter

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[392]United States v. Ware, 1 M.J. 282 (C.M.A. 1976).
[393]United States v. Russo, 1 M.J. 134 (C.M.A. 1975).
[394]Act of Nov. 9, 1979, Pub. L. 96-107, 93 Stat. 803, 810.
[395]93 Stat. at 811.
[396]Sen. Rep. 96-197, 9th Cong., 1st sess. 10.
[397] *Id.* at 121-25; H.R. Rep. 96-546, 96th Cong., 1st sess. 51.
[398]Act of Nov. 8, 1978, Pub. L. 95-610, 92 Stat. 3085.

as one primarily involving the right of nonmilitary individuals to bargain collectively.[399] In retrospect, therefore, this entire episode may well be a commentary on the sort of mental processes that were prevalent a decade or so ago. But Congress simply put its foot down and said, "No unions in the military forces." It found as a fact that "[u]nionization of the armed forces would be incompatible with the military chain of command, would undermine the role, authorization, and position of the commander, and would impair the morale and readiness of the armed forces."[400]

Chronologically, we now come to the Military Justice Act of 1983.[401] Many of the amendments affected by that enactment were narrow in scope, most of them reflecting the reality that much pretrial action as well as the first post-trial review of a record reflected less the action of the convening authority than it did the activities and the scrutiny of his staff judge advocate. But some of the changes made deserve specific mention.

First, Congress emphasized that the action of the convening authority on a record of trial involved primarily substance rather than legal detail, this in order to minimize the long list of CMA decisions that set aside convictions because of what was deemed erroneous in the staff judge advocate's review. Possible unfairness was eliminated by permitting counsel for the accused to submit a rebuttal to what the staff judge advocate had sent to the convening authority.[402]

Next, it was directed that, whenever either the Board for the Correction of Military Records or the Discharge Review Board examined a record of trial by court-martial, those bodies would be primarily limited to action in the nature of clemency.[403]

Third, while article 67 of the Code had originally provided that all cases involving general or flag officers be mandatorily reviewed by the CMA, the 1983 Act eliminated that requirement.[404] The dif-

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[399]Siemer, Drake, and Hut, *Prohibition on Military Unionization: A Constitutional Approach*, 78 Mil. L. Rev. 1 (1977). Ms. Siemer was then General Counsel of the Department of Defense; Mr. Drake was an attorney in that office; and Mr. Hut was a consultant retained by the same office.

[400]Act of Nov. 8, 1978, *supra* n.398, § 1(a) (5).

[401]Act of Dec. 6, 1983, Pub. L. 98-209, 97 Stat. 1393.

[402]UCMJ art. 60. *See* Sen. Rep. 98-53 and H.R. Rep. 98-549.

[403]Military Justice Act of 1983, § 11, 92 Stat. at 1407, adding 10 U.S.C. §§ 1552 and 1553.

[404]UCMJ art. 66.

ference between such cases and all others, a distinction held proof against an assertion that it was unreasonably discriminatory,[405] was no longer deemed vital enough to warrant special treatment, even though it had a long history. As Professor Bishop wrote, "Congress was probably motivated not so much by special solicitude for officers of high rank as by its judgment, which has much historical justification, that such proceedings—which have, of course, been infrequent—are likely to have a high political content."[406] But by 1983 that latter factor was deemed insufficient to warrant continuing the distinction.[407] The only cases now requiring mandatory CMA review are those involving approved death sentences and certified questions not calling for advisory opinions.[408]

Fourth, Congress granted the prosecution interlocutory appeals from adverse rulings, similar to the provision that permits such appeals in the federal judicial system for certain criminal cases under 18 U.S.C. § 3731.[409]

And finally, Congress authorized the Supreme Court to review by writ of certiorari decisions of the CMA, except in instances where the latter tribunal had declined to grant a petition for review.[410] That provision was invoked in the recent *Solorio* case,[411] wherein the Supreme Court at long last overruled the indefensible *O'Callahan* decision that had spawned the "service-connected" limitation on military jurisdiction over military persons.[412] In consequence, neither courts nor counsel need further concern themselves with the spate of attenuated distinctions that sought to determine when, whether, how, and where an offense was or was not "service-connected."[413]

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[405]Gallagher v. Quinn, 363 F.2d 301 (D.C. Cir.), *cert. denied*, 385 U.S. 881 (1966).

[406]J. Bishop, *supra* note 364, at 52-53, n.60.

[407]*See* Sen. Rep. 98-53, 98th Cong., 1st sess. 28:

> Only a handful of cases have involved general or flag officers since the UCMJ was enacted over 30 years ago; the requirement of mandatory appellate review in all cases involving such officers, however, may lead to a perception that the Code provides rights to flag and general officers that are not available to other service personnel. Although there are situations where military life requires distinctions based upon rank, this is not such a case.

[408]*See* United States v. Kelly, 14 M.J. 196 (C.M.A. 1982); United States v. Clay, 10 M.J. 269 (C.M.A. 1981); United States v. McIvor, 44 C.M.R. 210 (C.M.A. 1972); United States v. Aletky, 37 C.M.R. 156 (C.M.A. 1967).

[409]*See* UCMJ art. 62, as amended in 1983, and now entitled "Appeals by the United States."

[410]28 U.S.C. § 1259 (1982); and UCMJ art. 67(h).

[411]Solorio v. United States, 483 U.S. 435 (1987).

[412]O'Callahan v. Parker, 395 U.S. 258 (1969).

[413]J. Bishop, *supra* note 364, at 80, 91-100.

And with those comments on the more notable changes effected by the Military Justice Act of 1983, the chronology of American military law over the last three centuries has reached its terminus. The present author has not overlooked the circumstance that Congress later passed the Military Justice Amendments of 1986,[414] nor that the Supreme Court's ruling in the *Goldberg* case, which upheld the authority of the military to forbid a practicing Jewish officer to wear a *yarmulke* while in uniform,[415] appears to have been legislatively overruled.[416] But—this is a recital of prior actions and experiences on the part of many persons and many institutions, collected and assembled in the process of marking an historic anniversary. It is not simply the latest red-paper-covered supplement to that invaluable and indeed indispensable tool, *Shepard's Citations.*

IX. MILITARY LAW TODAY—WHERE SHOULD IT GO?

Shortly after accepting the School's invitation to speak on this occasion, I requested a copy of the current *Manual for Courts-Martial* (MCM). It was promptly dispatched—but upon opening the package I was truly appalled. Here was a quarto volume three inches thick that weighed five pounds. Is such a literally monstrous book really necessary to discipline our armed forces justly and effectively? Certainly this is not the *Manual for Courts-Martial-1984* that General Hodson envisaged a few years back.[417] And the volume presently in force bears but little resemblance to its predecessors of 1969, 1951, or 1949.

I might add parenthetically that complexity in military law is not restricted to the western shores of the Atlantic Ocean. Britain has had an official *Manual of Military Law* since 1884; the one now in effect is the 12th edition of 1972. Its function is precisely the same as that of our *Manual for Courts-Martial.* At this time it is just as thick as ours, although its pages are smaller—the British version is an octavo volume, while ours has quarto pages. Frankly, it is difficult for me to believe that the subject matter of either imperatively requires a book three inches thick. It should however be noted that, once the shooting starts, the British Army can deal with major of-

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[414]Act of Nov. 14, 1986, Pub. L. 99-661, §§ 801-808, 100 Stat. 3816, 3905.

[415]Goldman v. Weinberger, 475 U.S. 503 (1986).

[416]Act of Dec. 4, 1987, Pub. L. 100-180, § 508(a)(2), 101 Stat. 1019, 1086, enacting 10 U.S.C. § 774 (Supp. V 1987). *See* Sullivan, *The Congressional Response to Goldman v. Weinberger,* 121 Mil. L. Rev. 125 (1988).

[417]Major General K.J. Hodson [a former TJAG], 57 Mil. L. Rev. 1.

fenses through the field general court-martial, which operates under rules somewhat less complex than those governing general courts-martial in time of peace.[418]

Recrossing from overseas, and turning back to the *MCM, US, 1984*, I must admit that examination of its contents reveals few if any provisions that call for contradiction. After all, ever since 1920 Army courts-martial have been required to follow, at least generally, the rules of evidence applied in criminal cases in United States district courts,[419] and that provision was made applicable to the Navy and the Air Force also by article 36(a) of the Code. Consequently, when Congress enacted the Federal Rules of Evidence in 1975,[420] it was hardly a wide departure for the President to prescribe a set of Military Rules of Evidence to govern all trials by court-martial.

Much of the rest of the *MCM 1984* reflects what ardent lawbook publishers have long called "The Criminal Law Revolution." It is of course inevitable that every nation's armed forces reflect that nation's attitudes and outlook. And necessarily, military justice decisions are bound to follow, in greater rather than lesser degree, those of the homeland's highest court. But it is still essential for us to take a hard look at both the background and the doctrinal basis of America's Criminal Law Revolution.

The ideological background of that movement is the notion, still widely prevalent in some circles, that the fundamental objective of the criminal law is not the protection of society from unlawful acts, but the protection of the criminal from society's effort to bring him to account. The inevitable consequence of such an approach is that, once the lawbreaker's actions can be explained, they must necessarily be excused. This of course eliminates every shred of personal responsibility for an individual's own acts.

The doctrinal background of the Criminal Law Revolution is easily pinpointed. It is the view that the due process clause of the fourteenth amendment incorporates the substance of all of the first eight amendments.[421] That notion, it has been conclusively demonstrated,

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[418]See the references to field general courts-martial in the current *Manual of Military Law.*

[419]AW 38 of 1920 and 1948.

[420]Act of Jan. 2, 1975, Pub. L. 93-595, 88 Stat. 1926.

[421]*See* Frankfurter, *Memorandum on the "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 73 Harv. L. Rev. 746 (1965).

is directly contrary to history,[422] and is likewise contrary to the fourteenth amendment's judicial interpretation from the beginning.[423] During the flowering of this novel revelation, there were even rulings that undertook to constitutionalize the rules of evidence. After all, if the fourteenth amendment incorporates the sixth, then the latter's guarantee of the right "to be confronted with the witnesses against him" inevitably raises to constitutional stature every gyration of the hearsay's rule's manifold exceptions.[424]

It is not difficult to identify the fallacies underlying the Criminal Law Revolution. But, as a realistic matter, no far-reaching process of overruling, such as marked the end of the immunities doctrine,[425] can be expected.

We do know, however, that a healthy degree of rationality has returned to the doctrines governing collateral review of military decisions in the civil courts. Some years back, actually in 1949, Justice Jackson warned his colleagues in trenchant terms: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[426]

The case of *Parker v. Levy*[427] demonstrates that such a disaster was avoided only by a hair. Here was an officer who deliberately disobeyed orders, and who urged enlisted men to disobey any directions that would send them to Vietnam. He defended on the ground that the general military articles under which he had been convicted were unconstitutionally vague and that as applied they interfered, or were capable of interfering, with his constitutional right of free

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[422]Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan. L. Rev. 140 (1949).

[423]Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 Stan. L. Rev. 140 (1949).

[424]*See* Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965); Barber v. Page, 390 U.S. 719 (1968); Bruton v. United States, 391 U.S. 123 (1968); *cf.* California v. Green, 399 U.S. 149 (1970).

[425]Collector v. Day, 11 Wall. 113 (1870), *overruled by* Graves v. New York *ex rel* O'Keefe, 309 U.S. 46 (1939).

For a list of the earlier cases overruled during the time that Chief Justice Warren presided over the Supreme Court, see *The Constitution of the United States*, Sen. Doc. No. 92-82, at 1787-97. For a failure to comment on the contrast between that extensive course of extensive overrulings and some asserted later modifications by the Court, see comments in Book Review, 1 Intern. School of Law L. Rev. 79 (1976) (reviewing L. Levy, Against the Law: The Nixon Court and Criminal Justice (1974)).

[426]Terminiello v. Chicago, 337 U.S. 1, 13, 37 (1949).

[427]417 U.S. 733 (1974).

speech. At the urging of a veritable gaggle of lawyers,[428] two United States courts of appeals sustained his and another's contentions regarding the impermissible lack of clarity inherent in the general articles.[429] Only a bare majority of the Supreme Court rejected those contentions, one member pointing out that, in the dissent, "[m]y Brother Douglas's rendition of Captain Levy's offense would lead one to believe that Levy was punished for speaking against the Vietnam war at an Army wives' tea party." [430] As the Duke of Wellington said of his victory at Waterloo, "It has been a damned nice thing—the nearest run thing you ever saw in your life."[431]

Fortunately, the more rational approach prevails today. The "service-connected" jurisdictional limitation, first invented in the *O'Callahan* case,[432] has, after eighteen years of vexatious efforts to ascertain its actual parameters,[433] finally given way to the more rational test enunciated in *Solorio*. Thus today, consistent with the ultimate decisions dealing with civilians tried by court-martial, the test of military jurisdiction is simply military status.[434]

Similarly, the nationwide spirit of litigiousness was halted in *Chappell v. Wallace*,[435] which held that enlisted military personnel may not maintain a civil action to recover damages from a superior officer for alleged constitutional violations. In the *Augenblick* case,[436] it had earlier been held that asserted errors in military trials that "did not rise to a constitutional level" would not support proceedings for lost pay and allowances in the Court of Claims. And the Fifth

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[428]According to J. Bishop, *supra* note 364, at 35, Captain Levy's petition for certiorari was signed by eight lawyers. Inasmuch as the U.S. reports have for some years now omitted the names of counsel in the notation of certiorari granted or denied, it is not possible, barring actual inspection of the Supreme Court's own file of records and briefs, to verify whether eight lawyers signed the petition for certiorari in Levy v. Corcoran, *cert. denied*, 389 U.S. 960 (1967), or in Levy v. Resor, *cert. denied*, 389 U.S. 1049 (1968). The final stage of the *Levy* litigation, which resulted in the decision sustaining the constitutionality of the general military articles in Parker v. Levy, 417 U.S. 733 (1974), reached the Supreme Court on the warden's appeal (414 U.S. 816 (1973)).

[429]The Third Circuit in Levy v. Parker, 478 F.2d 772 (3d Cir. 1973), and the D.C. Circuit in Avrech v. Secretary of the Navy, 477 F.2d 1237 (D.C. Cir. 1973). Ironically enough, the *Avrech* opinion was written by retired Supreme Court Justice Clark—the same who had authored the subsequently withdrawn pro-military opinions in Kinsella v. Krueger I, 351 U.S. 470 (1956) and Reid v. Covert I, 351 U.S. 487 (1956)!

[430]Blackmun, J., concurring in Parker v. Levy, 417 U.S. 733, 762, 765 n.* (1974).

[431]Oxford Dictionary of Quotations 564 (2d ed. 1953) (quoting from the *Creevy Papers*).

[432]O'Callahan v. Parker, 395 U.S. 258 (1969).

[433]J. Bishop, *supra* note 364, at 91-100; P.C.M. 203, in MCM, US, 1984.

[434]*See supra* notes 411-13 and accompanying text.

[435]462 U.S. 296 (1983).

[436]393 U.S. 348 (1969).

Circuit's later refusal in Lieutenant Calley's case to flyspeck that officer's record of trial by court-martial, by a vote of 8 to 5 in an in banc hearing, should help settle the rule that habeas corpus is unavailable to reexamine the minutiae of a record that has already been reviewed by both the Court of Military Review and the Court of Military Appeals.[437]

Thus, as a practical matter, the confusion left by the circumstance that there was no opinion of the Court in *Burns v. Wilson*[438] has now been dissipated. Nothing in that decision undertook to explore the applicability to military trials of *Johnson v. Zerbst*,[439] the first ruling permitting major trial errors to be examined collaterally on habeas corpus. Accordingly, Justice Frankfurter had urged in the *Burns* case that there be a reargument "before enunciating the principle that a conviction by a constitutional court that lacked due process is open to attack by habeas corpus while an identically defective conviction rendered by an *ad hoc* military tribunal"—citing Winthrop *53-*54—"is invulnerable."[440] That did not then persuade the Court. But now, thirty-five years later, the matter appears finally to have been settled by other decisions: a military conviction will be set aside collaterally only when military jurisdiction is entirely absent[441] or when the conduct of the trial has been such that, even though jurisdiction originally attached, the accused's constitutional rights were impaired in the course of the proceedings.[442]

Of course there is unreality, not to say anachronism, in speaking of service personnel's constitutional rights. I make that assertion on the authority of James Madison himself, who in the First Congress was not only the proponent but actually the author of our Bill of Rights. And support of that statement is found in the case of General William Hull, who was convicted and sentenced to death in 1814 for surrendering Detroit to the British in 1813 without firing a shot in its defense.[443]

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[437]Calley v. Callaway, 519 F.2d 184 (5th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).
[438]346 U.S. 137 (1953).
[439]304 U.S. 458 (1938).
[440]Burns v. Wilson, 346 U.S. 137, 844, 851 (1953). See the same Justice's opinion on the original hearing, 346 U.S. 137, 148, 150 (1953). J. Bishop, *supra* note 364, at 123-36 contains a thoughtful discussion of the basic problem.
[441]Reid v. Covert, 354 U.S. 1 (1957), and its sequels, the *Singleton*, *Grisham*, *Guagliardo*, and *Wilson* cases in 361 U.S., discussed *supra* at text accompanying notes 309-14.
[442]Augenblick v. United States, 393 U.S. 348 (1969).
[443]In order to render unnecessary a proliferation of citations, it should be sufficient simply to refer to the documents and other authorities included in my 1958 paper, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 Harv. L. Rev. 1, 29-49 (1958), *reprinted in* Mil. L. Rev. Bicent. Issue 171, 193-212 (1975).

Inasmuch as this was a case involving a general officer, Article of War 65 of 1806 required the proceedings to be laid before the President—who then was the very same individual who had fathered the Bill of Rights, namely, James Madison. The record in question plainly showed that General Hull's counsel had not been permitted either to address the court-martial directly or to examine any witnesses. Indeed, throughout the trial, they were at all stages prevented from doing what an accused's legal representatives had at all times been allowed to do in American civil courts, and indeed had regularly done in England in treason cases since 1696, when defendants charged with that offense had first been granted a right to counsel.

The sixth amendment to the Constitution of the United States had granted the accused, "In all criminal prosecutions . . . the right . . . to have the Assistance of Counsel for his defense." Plainly, that had been denied General Hull, who, while imploring the court-martial to be granted such assistance, frankly admitted that the sixth amendment affected only trials in civil courts. And President Madison, who read court-martial records carefully, and who never hesitated to point out any irregularities that he found therein, approved the sentence—although, in accordance with the court-martial's recommendation for clemency, he remitted its execution. Therefore, we have, not on speculation, not on conjecture, not on supposition, irrefutable proof that the father and author of our Bill of Rights did not consider its provisions for "all criminal prosecutions" applicable to military trials, trials that, then as now, were always limited to prosecutions for criminal offenses.[444]

Of course, here again, we cannot turn back the constitutional clock. But we can, and should, make a determined effort both to simplify and to quicken our existing system of military justice.

Burns v. Wilson, already mentioned, involved an instance of rape and murder on the island of Guam. The offenses were committed in December 1948, but it was November 1953, nearly five years later, before the Supreme Court finally denied rehearing.[445]

In the case of Major General Robert W. Grow, the offenses of which he was convicted—failure to safeguard classified information—were

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[444]The foregoing conclusions, first published over 30 years ago, won the concurrence of two distinguished constitutional scholars, both now unfortunately deceased. J. Bishop, *supra* note 364, at 115; A. M. Bickel, The Least Dangerous Branch 102 (1962).

[445]Date of offense, *see* Dennis v. Lovett, 104 F. Supp. 310 (D.D.C. 1952); date of rehearing denied, Burns v. Wilson, 346 U.S. 844 (1953).

committed between January and June 1951. Final review by the Court of Military Appeals took place in July 1953, but the President failed to act on the proceedings until July 1957. Thus the final action in the case took place six years after the time of General Grow's offenses.[446]

A generation later, most regrettably, there are still numerous instances of similar dilatoriness. Here are some not at all imaginary horribles from the latest three volumes of the *Military Justice Reporter*.

From time of trial or offense to action of the Court of Military Review, I have found instances of intervals of 25,[447] 27,[448] 36,[449] and even 47 months.[450] Delays of that length are not only intolerable, but, because they took place prior to intervention by the Court of Military Appeals, unexplainable as well.

The recent Court of Military Appeals Review Committee's Report, dated January 1989, indicated that "the time from sentence to decision has been unacceptably high."[451] Examination of the decisions in volumes 27 and 28 of the *Military Justice Reporter* reveals two instances of a four-year lapse between the time of the offense to that of final Court of Military Appeals decision,[452] one where that interval was five years less one month,[453] and one case where the time between offense and ultimate CMA ruling was six years and seven months, or seventy-nine months in all.[454] In that last example a rehearing was authorized, which leads one to wonder how this matter could possibly be retried effectively after such a fantastic hiatus. How credible can any witness's testimony be that long after the fact? Indeed, in one extreme case, the Court of Military Appeals's opinion came down no less than eighty-five months after the offense was committed: seven years plus one month![455]

So far as Court of Military Appeals delays are concerned, its Committee's 1989 Report has set forth the reason, namely, that "too much

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[446]United States v. Grow, 11 C.M.R. 77 (C.M.A. 1953); G.C.M.O. 47, HQ, DA, 1957.
[447]United States v. Billig, 26 M.J. 744 (N.C.M.R. 1988).
[448]United States v. Smith, 18 M.J. 704 (A.C.M.R. 1984), 27 M.J. 242 (C.M.A. 1988).
[449]United States v. Thatcher, 21 M.J. 909 (N.C.M.R. 1986), 28 M.J. 20 (C.M.A. 1989).
[450]United States v. Dock, 26 M.J. 620 (A.C.M.R. 1988), 28 M.J. 117 (C.M.A. 1989).
[451]USCMA Committee Report (Jan. 27, 1989), at 19.
[452]United States v. Quillen, 26 M.J. 312 (C.M.A. 1988); United States v. Thatcher, 28 M.J. 20.
[453]United States v. Dock, 28 M.J. 117.
[454]United States v. Smith, 27 M.J. 242.
[455]United States v. Hubbard, 28 M.J. 27 (C.M.A. 1989).

time is spent away from the Court and too little time is spent in the disposition of cases that have lingered in the Court," this because "the judges spend a great deal of time traveling to various conferences and legal education programs."[456] The Court itself refers to its members' absences as "Judicial Visitations."[457]

Now that the Court of Military Appeals has been in existence for close to forty years, so that both its existence and its jurisdiction are, or certainly should be, thoroughly familiar to the profession, it is difficult to understand why or how its members can really justify activities of that nature at the cost of delaying disposition of the cases that constitute their primary and indeed only statutory duty.

So far as delivering addresses is concerned, no judge of any court, civil or military, should ever hold forth publicly on issues that are before him or are apt to come before him in his judicial capacity. If a judge feels impelled to public discourse at appropriate obituary occasions, or to reminisce with graduates or students of an institution that he and they have both attended, well and good. But no judicial officer should ever deal publicly with justiciable matters except in the opinions that he writes for (or, if dissenting, against) the court of which he is a member. Unfortunately, the late Chief Justice Warren and some of his departed colleagues set a bad example for the American judiciary of just such inappropriate verbal activity.

A second reason for the Court of Military Appeals's "Judicial Visitations" has been the travel to distant overseas stations, purportedly undertaken for examining the operations of the military justice system on the spot. As a realistic matter, such trips are completely worthless for their asserted purpose. Whenever a judge of the Court of Military Appeals engages in an official visit to any military or naval installation, whether in the United States or abroad, it is unfortunately the fact that he will be so buttered up and so slobbered over by all personnel from the most senior commander down that, even if the judge in question should be the most objective and perceptive individual ever created, he simply could not learn anything factual about the matters he is undertaking to examine.

After all, the members of the Supreme Court of the United States do not ride circuit to ascertain how the United States courts of appeals and the United States district courts are performing. Indeed,

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[456]*See* "The Impact of Travel," in USCMA Committee Report, *supra* note 451, at 19-20.
[457]*See* 26 M.J. CII-CIV.

the first seventy years' history of the federal judicial system shows how long it took Congress to free Supreme Court Justices from the burdens of circuit riding.[458] Today it is considered that the annual meetings of the Judicial Conference provide a wholly adequate forum for the airing of difficulties arising in the work of the federal judicial system, just as, it is submitted, the annual meeting of the article 67(g) Committee constitutes the appropriate locus for discussing the problems of the military justice system.

In short, as the Court of Military Appeals's own Committee indicated, although perhaps in somewhat more restrained terms, it is high time that the Court of Military Appeals tended to its knitting, ruled more promptly on the matters it is duty bound to determine, and terminated its judicial visitations, so that, as its own Committee urged, "all judges are together at the Court for substantial portions of the year."[459] Only then can one expect some shortening of the intolerable delays now occurring in the Court of Military Appeals's processing of cases.

And *a fortiori*, the members of the Courts of Military Review, who do not visit distant garrisons, hold forth at bar association gatherings, or undertake to instruct the young, should apply themselves more assiduously than they appear at present to be doing to hear and above all to determine the cases coming before them. After all, except for such annual and sick leave as is granted them by law, the members of courts of military review are always together.

Certainly we cannot afford comparable delays at any level of the present two-tiered military appellate system in a time of imminent, not to say actual, national peril. Of course swift justice differs from just swiftness—but does even exacting appellate review really require such deliberate lack of speed? Interestingly enough, in one of the last bound volumes of the *Military Justice Reporter*, only a single reversal by the Court of Military Appeals was rested on improper command control.[460]

Some of the military justice complications prior to 1983 were evoked by the circumstance that the prosecution was unable to appeal untenable trial rulings; this led to widespread resort to extraor-

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[458]F. Frankfurter and J. Landis, The Business of the Supreme Court chaps. I and II (1928).

[459]USCMA Committee Report, *supra* note 451, at 26 ¶ M.

[460]United States v. Levite, 25 M.J. 334 (C.M.A. 1987).

dinary writs.[461] It is not clear, either from the decisions or from the literature, whether the appeals by the United States now available in the military justice system by the current version of article 62 have been deemed to lessen the current invocation of such writs.[462]

One hundred and eighty years ago Brigadier General James Wilkinson, commanding the United States Army, dealt with a record of trial by court-martial in which, contrary to the practice then existing, the accused had received professional legal assistance. The proceedings were accordingly disapproved, General Wilkinson saying, "Shall Counsel be admitted on behalf of a Prisoner to appear before a general Court Martial, to interrogate, to except, to plead, to teaze, perplex & embarrass by legal subtilties & abstract sophistical Distinctions?"[463] Today we know, from documents unavailable at the time, that Wilkinson was an arch-scoundrel, who while heading the young republic's tiny military force was simultaneously in the pay of Spain.[464] But I must confess that, when I think of the use made of extraordinary writs in today's operation of the military justice system, my sentiments echo those of the individual who commanded the United States Army in the year 1809.

While the present paper was being composed, the Court of Military Appeals decided the case of *Court of Military Review v. Carlucci*.[465] There the Navy-Marine Corps Court of Military Review asked for, and was granted, an injunction against the Secretary of Defense and against the Inspector General of that Department to prevent both from inquiring of the plaintiff's members why they acted as they did in reversing a particular conviction. That executive inquiry was based on an anonymous tip, and, after a Special Master had been appointed to ascertain the facts, no evidence of any kind was presented to him.[466]

One may agree fully with the result without agreeing with all the reasoning adduced to reach it. Of course it is vastly improper and

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[461]Pavlick, *Extraordinary Writs in the Military Justice System: A Different Perspective*, 84 Mil. L. Rev. 7 (1979).

[462]DAD Note, *Putting on the Writs: Extraordinary Writs in a Nutshell*, The Army Lawyer, May 1988, at 20.

[463]The complex text of the disapproval is at Wiener, *supra* note 47, 72 Harv. L. Rev. at 27-28, Mil. L. Rev. Bicent. Issue at 193-94.

[464]J. Ripley, Tarnished Warrior: Major General James Wilkinson (1938), esp. at 266-75. This is an admirable book, but the noun "Warrior" in its title is too strong, while the adjective "Tarnished" is far too weak.

[465]27 M.J. 11 (C.M.A. 1988); 26 M.J. 328 (C.M.A. 1988).

[466]27 M.J. 407 (C.M.A. 1988).

wholly unlawful to ask any judicial officer why and how he arrived at his decision. This is particularly so when, as in the particular case, that query raises the specter of command influence, in this instance when members of the Department of Defense undertook to question members of a Court of Military Review. Moreover, since the initial but aborted investigation rested on little more than suspicion, the case against the plaintiff was very weak.

Consequently, the Court of Military Appeals ruled that the sole investigatory power in the premises was its own, and the Special Master appointed was one of its members. But should the same result have been reached if the questioning that was proposed had emanated from the F.B.I., or if the executive department concerned had been the Department of Justice?

After all, judicial independence does not include any right to commit judicial misconduct. For that proposition, which assuredly does not rest only in imagination, I need only cite a sad instance from half a century ago. That was the case of Martin T. Manton, for twelve years the Senior Circuit Judge of the Second Circuit, who was ultimately convicted of taking money from litigants appearing before him.[467]

But, that melancholy example to one side, I suggest that the course in which the military justice system should move in the future is one in which more attention is paid to substance and less to form. Every accused is entitled to a fair trial; none may properly ask for one that is perfect. And it may well be questioned how far a military code, designed to discipline the nation's armed forces, should provide opportunities for litigative inventiveness.

As has been pointed out, the doctrine of harmless error made its appearance in the Articles of War three years before a similar provision became part of the Judicial Code.[468] It has also been shown how, in 1968 and again in 1979, Congress legislatively overruled untenable decisions of the Court of Military Appeals.[469] The bulk and complex-

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[467]United States v. Manton, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1940). Prior to 1948 what are now the Chief Judges of a Circuit were known as Senior Circuit Judges. Martin T. Manton occupied that position in the Second Circuit from 1927, when Judge C.W. Hough died, until early in 1939, when he resigned from the bench at President Roosevelt's demand. For the shabby details of his "sale of judicial action," readers are urged to examine the opinion in 107 F.2d 834, written by retired Supreme Court Justice Sutherland.

[468]*See supra* note 268 and accompanying text.

[469]*See supra* notes 394-97 and accompanying text.

ity of the current *Manual for Courts-Martial* strongly suggests that legislative help is needed to simplify military law and to emphasize in more effective and more cogent language than is now on the books the view that error not touching fairness or substance be frankly disregarded, so that the actual operation of the military code can be extricated from the labyrinthine quagmire in which it is currently entangled.

When Colonel Winthrop in 1886 wrote the preface to the first edition of his now classic text, he expressed the hope that any lawyer reading it would

> discover in these pages that there is a military code of greater age and dignity and of a more elevated tone than any existing American civil code, as also a military procedure, which, by its freedom from the technical forms and obstructive habits, that embarrass and delay the operations of the civil courts, is enabled to result in a summary and efficient administration of justice well worthy of respect and imitation.

Let me go back also to the measure that we commemorate here today, the First Mutiny Act of 1689. The preamble to that legislation, before enacting its substantive provisions, recited that,

> it being requisite for retaineing such Forces as are or shall be raised dureing this exigence of Affaires to their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or Stirr up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment than the usuall Forms of Law will allow.

Yet at that time the forms of law usual in England's prosecutions made no provision for writs of error or any other appellate review. Both Holdsworth and Sir James Fitzjames Stephen assure us that, in 1689, the sole remedy for an unjust conviction was a pardon.[470] Yet Parliament enacted a more succinct and compact system for its soldiers "dureing this exigence of Affaires" than was then usual in nonmilitary prosecutions.

Of course we cannot go back three centuries. Of course we cannot urge the adoption of any scheme that would only prove that over

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[470] 1 W. Holdsworth, History of English Law 217 (7th ed. 1956); 1 J. Stephen, A History of the Criminal Law of England 311 (1883).

the space of three hundred years we have forgotten nothing and learned nothing. Now that the possibility of command influence has been well-nigh eliminated by the creation of an independent military judiciary, we certainly will not recreate the mechanism for returning for revision of findings and sentences displeasing to the convening authority (or to his staff judge advocate). Similarly, we cannot jettison the view now universally held that every criminal conviction must be subject to test for error. Executions as summary as those that concluded the Houston riot trial in 1917 shocked the national conscience more than seventy years ago[471]—and would shock it rather more today.

But we must never for a moment forget the features that differentiate a civilian from a military society. The object of the former is to secure the greatest good for the greatest number and to reach that end after due deliberation. But an armed force is not, and never can be, a deliberative body. It is, in the classic definition of John Locke, a collection of armed men obliged to obey one man. And it was Locke who formulated the philosophical justification for the Glorious Revolution of 1688, the very event that, purely as a matter of self-protection, evoked the passage of the First Mutiny Act.

The task of statesmanship three centuries later is to fashion a system of military justice that, without the slightest sacrifice of fairness, will yet be far less complex, far less enmeshed in a mass of detail, and far less subject to the virus of unrestrained litigiousness, than the arrangement that governs our armed forces today. Today, as in England in 1689, the desired objective is that our armed forces "be brought to a more exemplary and speedy Punishment than the usuall forms of Law will allow." That, I submit is the lesson to be read, learned, and inwardly digested as we mark the Tricentennial of the First Mutiny Act.

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[471] *See supra* notes 106-10 and accompanying text.

THE SIXTH ANNUAL WALDEMAR A. SOLF LECTURE IN INTERNATIONAL LAW:

TERRORISM, THE LAW, AND THE NATIONAL DEFENSE

by Abraham D. Sofaer*

EDITOR'S NOTE: *Judge Abraham D. Sofaer presented the sixth annual Waldemar A. Solf Lecture in International Law to the staff, faculty, and graduate students of The Judge Advocate General's School of the Army on May 4, 1989. The School's Center for Law and Military Operations sponsored this presentation.*

I. INTRODUCTION

This distinguished institution, our profession, and our society are deeply committed to the rule of law. To us, law is the vehicle for assuring order and fairness in human relations. Law is congenial to freedom, to tolerance, and to a process of reasoned debate and democratic choice. To us, terrorism is the antithesis of law, the substitution of coercion for persuasion and choice. Law, we believe, is a proper means for controlling terrorist conduct. And we are committed, in pursuing the fight against terrorism, to act lawfully, to avoid sacrificing those values of which terrorists seek to deprive us.

Our faith in law stems from our good experience with it. Not all law is good law, however. The law is frequently used by totalitarian regimes as an instrument of terror and evil. The law can be used by terrorists as well, and by their supporters, as a means for undercutting the capacity of free nations to act against them. Terrorists have no respect for law and no commitment to accept the rules of any legal system. But they know the value of having the law on their side, and they have battled to influence the international legal system in their favor. A contest has been underway since the 1960's over the values that international law should serve, and particularly the extent to which the law will protect and otherwise serve the use of violence for political ends.

The law's application to terrorist incidents led me to write in 1986

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that international law is too often used to serve terrorists and their objectives.[1] Some progress has been made since that time in reducing the extent to which international law tends to protect political violence.[2] Important progress has been made, moreover, in developing a more effective international system of criminal justice to deal with terrorism and other international crimes. During the last few years, several international terrorists have been arrested, tried, and punished for their crimes.[3]

These developments have at most only marginally reduced the effects of state-sponsored terrorism. Devastating tragedies, such as the destruction of Pan Am 103, are well within the capacity of state-sponsored terrorists to achieve. To deal effectively with state-sponsored terrorism requires treating its proponents not merely as criminals, but as a threat to our national security. This is in fact the deliberate policy of the United States, implemented by measures in the Carter and Reagan Administrations and supported by the Task Force on Combatting Terrorism chaired by then Vice President George Bush.[4]

The law has played—and must continue to play—an important role in marking the limits and conditions on measures used to protect our national security against state-sponsored terror. Many proposed military actions were considered and rejected during recent years on legal grounds. That must and will continue to occur. But the law must not be allowed improperly to interfere with legitimate national security measures. In important respects, it is doing so today. My purpose here is to review areas in which unwarranted limitations are being imposed on counter-terrorist actions, under both international law and U.S. domestic law, and to explain some of the dangers such limitations may pose.

In the realm of international law, several legal concepts have been invoked that would impose serious limits on strategic flexibility. The

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[1]Sofaer, *Terrorism and the Law*, 64 Foreign Aff. 901 (1986).

[2]An effort by Syria, for example, to renew the sterile U.N. debate over the definition and causes of terrorism failed; many States have signed the Maritime Terrorism Convention, providing for the prosecution or extradition of pirates, irrespective of whether they act for "private" or political objectives; and the United States has formally refused to ratify Protocol I of the Protocols Additional to the Geneva Protocols on the Laws of War, which provides terrorists, among other things, with the right to POW status.

[3]*See generally* Dep't of State, U.S. Counter-terrorism Policy Notebook, "Rule of Law" (1989).

[4]*See* Public Report of the Vice President's Task Force on Combatting Terrorism 7-8 (1986).

most significant of these is the narrow view of self defense recently espoused by the International Court of Justice (ICJ) in *Nicaragua v. United States*.[5] Narrow views of self defense give terrorists and their state sponsors substantial advantages in their war against the democracies.

Domestic law has also created problems for the United States in combatting state-sponsored terrorism. Congress has adopted laws that enhance the authority and capacity of U.S. officials in dealing with terrorism through criminal law enforcement.[6] In the area of national defense, however, while Congress has supplied the military means for countering terrorists and their sponsors, the War Powers Resolution has a potentially detrimental impact on the nation's capacity to act effectively. The executive branch has also established rules that, to the extent they are not properly understood or applied, have a detrimental effect on the nation's capacity to combat state-sponsored terror. The Executive Order prohibiting assassination, in particular, has created generalized uncertainty about the legality of using lethal force.

To the extent these limitations are not in fact mandated by the U.N. Charter, customary principles of international law, or the U.S. Constitution, they are indefensible. State-sponsored terrorism poses a threat to our national security, to which the United States must respond effectively. To succeed in this effort, our nation's policy planners and military strategists are entitled to as much flexibility as possible in combatting an enemy that accepts no limits based on law, but only those imposed by an effective defense. As lawyers, we have a special responsibility to identify and to revise or reject unjustifiable legal restrictions on our nation's capacity to protect its security. The President and other national security leaders will naturally regard any use of force with great caution, and good judgment may counsel against some such actions even where the law allows them. But the law should not be distorted or manipulated to dictate restraints in circumstances where judgment is the proper measure.

II. THE USE OF FORCE

Terrorists and their supporters seek to have their way and to harm their enemies by using force against them. Under the domestic law of any State, the unauthorized use of force is subject to control and

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[5]Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J. 14 (Judgment on the Merits of June 27, 1986) [hereinafter *Nicaragua v. United States*].
[6]*E.g.*, 18 U.S.C. §§ 2331, 3071-3077 (1982).

punishment. Our counter-terrorism policy relies in the first instance on the enforcement of our own laws and on the willingness of other States to enforce their laws against terrorist conduct. International conventions condemning a variety of acts widely recognized as crimes call for States to utilize their criminal law to prosecute violators or to extradite them. Considerable progress has been made in recent years in dealing with terrorism through international cooperation. We have also used our authority under international law to arrest terrorists in international territory, where legal problems concerning the territorial sovereignty of other States are avoided. And we invariably resort to economic and diplomatic sanctions before using force in our self defense.

Several States, however, instead of enforcing their domestic law against or extraditing terrorists, protect, train, support, or utilize terrorist groups to advance policies they favor. Some States, such as Lebanon, are simply unable to exercise authority over terrorists, even if they were inclined to do so. The United States must be free to utilize force with sufficient flexibility to defend itself and its allies effectively against threats resulting from such breaches of international responsibility. As Secretary of State George P. Shultz predicted in 1984: "We can expect more terrorism directed at our strategic interests around the world in the years ahead. To combat it, we must be willing to use military force."[7]

The use of force is governed in international law by the U.N. Charter, which in article 2(4) obligates all members "to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state." The Charter expressly provides, however, in article 51, that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The United States has always assumed that these Charter provisions, and the understandings and customary practice that help define their meaning, provide a workable set of rules to deal with the array of needs that potentially require the use of force, including such threats as state-supported terrorism and insurgencies. General Assembly interpretive declarations make clear that "force" means

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[7]Address Before the Park Avenue Synagogue, Oct. 25, 1984, *reprinted in* Dep't of State Bull. 12, 16 (Dec. 1984) [hereinafter Park Avenue Synagogue Address].

physical violence, not other forms of coercion. But they also indicate that aggression includes both direct and indirect complicity in all forms of violence, not just conventional hostilities.[8] The United States has long assumed that the inherent right of self defense potentially applies against any illegal use of force, and that it extends to any group or State that can properly be regarded as responsible for such activities.

These assumptions are supported in customary practice.[9] A substantial body of authority exists, however, which advocates positions that, if adhered to by the U.S., would largely undermine this or any other nation's capacity to defend itself against state-sponsored terrorism. The principal limitations proposed in these sources are: a) an unrealistically limited view of the meaning of "armed attack"; b) artificially restrictive views of necessity and proportionality; c) restrictions on the situations in which terrorist groups or States can be held responsible for terrorist actions; and d) absolute deference to the principle of territorial integrity.

A. ARMED ATTACK

Article 51 preserves the right to self defense "if an armed attack occurs against a Member." This language suggests to some writers that force can be used in self defense only to defend against an "armed attack" that "occurs" "against [the territory of] a Member." Proponents of this restrictive view of self defense would greatly limit the extent to which force can lawfully be used to prevent or to deter future attacks and to defend against attacks upon the citizens or property of a member, outside its territory, that cannot be said to threaten its "territorial integrity or political independence."

A disturbing instance of this reasoning is found in the ICJ's decision in *Nicaragua v. United States*. The ICJ declined to find that Nicaragua had engaged in "aggression," although the court either found or assumed that Nicaragua had supplied arms to the rebels in El Salvador for several years.[10] The court concluded that a limited intervention of this sort cannot justify resort to self defense, because

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[8]Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. G.A. Res. 2625 (1970).

[9]*See, e.g.*, Sofaer, *International Law & the Use of Force*, Nat'l Interest, Fall 1988, at 53, 54-57.

[10]Judge Singh assumed the flow of arms had "been both regular and substantial, as well as spread over a number of years and thus amounting to intervention." *Nicaragua v. United States*, 1986 I.C.J. at 154 (Sep. Op. Singh, J.P.).

customary law only allows the use of force in self defense against an "armed attack," and an armed attack does not include "assistance to rebels in the form of the provision of weapons or logistical or other support."[11] This ruling is without support in customary international law or the practice of nations, which could not be read to deprive a State of the right to defend itself against so serious a form of aggression. Recognizing this, the ICJ came up with the following solution: a State is not permitted to resort to "self-defense" against aggression short of armed attack, but it may be able to take what the court called "proportionate countermeasures."[12] While a State that is the victim of a terrorist attack based on such support by another State may seek to resort to "countermeasures," the fact that the court refused to treat such support as a basis for *self defense* erroneously suggests it is necessarily a less serious form of aggression than a conventional attack, and thus a less legitimate basis for the defensive use of force.

The United States rejects the notion that the U.N. Charter supersedes customary international law on the right of self defense. Article 51 characterizes that right as "inherent" in order to prevent its limitation based on any provision in the Charter. We have always construed the phrase "armed attack" in a reasonable manner, consistent with a customary practice that enables any State effectively to protect itself and its citizens from every illegal use of force aimed at the State. Professor Schachter, among other prominent scholars, supports the view that attacks on a State's citizens in foreign countries can sometimes properly be regarded as armed attacks under the Charter.[13]

Furthermore, the law concerning the use of force should not be manipulated by lawyers or judges to reflect their inexpert premises or outright bias as to the relative danger or desirability of particular forms of aggression. State-sponsored terrorism and other methods

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[11] *Id.* at 119 (Judgment on the Merits). Professor Joachim A. Frowein recently supported this line of argument, contending: "If words mean anything, there cannot be any question that an armed attack cannot consist of a terrorism action against citizens on foreign territory, even if tolerated by the territorial State." Frowein, *The Present State of Research Carried Out by the English-Speaking Section of the Centre for Studies and Research*, 1988 Academie Du Droit 55, 64.

[12] *Nicaragua v. United States*, 1986 I.C.J. at 127.

[13] "[W]hen such attacks are aimed at the government or intended to change a policy of that state, the attacks are reasonably considered as attacks on the state in question. In some cases, attacks on non-nationals who have ethnic or religious affiliations with a state opposed by the terrorists should be regarded as attacks on the state." Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 Hous. J. Int'l Law 309, 312 (1989).

by which States can act through surrogates enable States to bring about attacks on their enemies with a much higher possibility of evading responsibility (and legitimate retaliation) than if they undertook the attacks themselves. These attacks can be extremely serious, moreover, even though they occur in territory other than that of the State whose citizens are attacked, and they have become a substantial threat to the national security of the United States and other nations. In the last twenty years, the annual number of terrorist incidents has increased four-fold, and the number of injuries to U.S. citizens has increased even more dramatically. In 1968 terrorists inflicted 15 U.S. casualties; in 1988, 232 U.S. citizens were injured or killed during terrorist attacks.[14]

A sound construction of article 51 would allow any State, once a terrorist "attack occurs" or is about to occur, to use force against those responsible for the attack in order to prevent the attack or to deter further attacks unless reasonable ground exists to believe that no further attack will be undertaken. In 1984 Secretary Shultz described this policy as an "active defense." "From a practical standpoint," he said, "a purely passive defense does not provide enough of a deterrent to terrorism and the states that sponsor it."[15] Later that year he described why an active defense was needed to deter:

> We must reach a consensus in this country that our responses should go beyond passive defense to consider means of active prevention, preemption, and retaliation. Our goal must be to prevent and deter future terrorist acts, and experience has taught us over the years that one of the best deterrents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it. We should take steps toward carrying out such measures. There should be no moral confusion on this issue. Our aim is not to seek revenge but to put an end to violent attacks against innocent people, to make the world a safer place to live for all of us. Clearly the democracies have a moral right, indeed a duty, to defend themselves.[16]

Deterrence is a key principle under the Charter. A view of the meaning of "armed attack" that restricts it to conventional, ongoing uses of force on the territory of the victim State would as a practical mat-

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[14]Statistics compiled by the Office of the Coordinator on Anti-terrorism, U.S. Dep't of State (1989).

[15]Address Before the Jonathan Institute, June 24, 1984, *reprinted in* Dep't of State Bull. 31, 33 (Aug. 1984).

[16]Park Avenue Synagogue Address, *supra* note 7, at 16.

ter immunize those who attack sporadically or on foreign territory, even though they can be counted on to attack specific States repeatedly.

The notion that self defense relates only to a use of force that materially threatens a State's "territorial integrity or political independence," as proscribed in article 2(4), ignores the Charter's preservation of the "inherent" scope of that right. Nations—including the U.S.—have traditionally defended their military personnel, citizens, commerce, and property from attacks even when no threat existed to their territory or independence. The military facilities, vessels, and embassies of a nation have long been considered its property, and for some purposes its territory. Attacks on a nation's citizens cannot routinely be treated as attacks on the nation itself; but where an American is attacked because he is American, in order to punish the U.S. or to coerce the U.S. into accepting a political position, the attack is one in which the U.S. has a sufficient interest to justify extending its protection through necessary and proportionate actions. No nation should be limited to using force to protect its citizens, from attacks based on their citizenship, to situations in which they are within its boundaries.

B. NECESSITY AND PROPORTIONALITY

The U.S. is committed to using force in its self defense only when necessary, and only to the extent it is proportionate to the threat defended against. Our uses of force during the Reagan Administration met these tests. In fact, military planners were not infrequently accused of having too greatly limited our actions, particularly against Iran in the Persian Gulf.

Writers seeking to impose the strictest possible limits on self defense, who generally claim for purposes of defining self defense that customary law has been superseded, nonetheless turn to precedents in customary law for definitions of necessity and proportionality. Particularly popular is Secretary of State Daniel Webster's description of anticipatory self defense in *The Caroline* dispute. A State, he wrote, must demonstrate a "necessity for self defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and must do "nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it."[17] This state-

[17]Letter from U.S. Secretary of State Daniel Webster to Lord Ashburton, *reprinted in* 2 Moore's Digest of Int'l Law 412 (1906).

ment exaggerates the test of necessity in a situation where that issue was dicta. More fundamentally, moreover, the *Caroline* test was applied when war was still a permissible option for States that had actually been attacked. Webster's statement therefore related, in that context, to situations in which no prior attack or other act of war had occurred.

An unrealistically strict view of necessity and proportionality was most recently advanced by the ICJ in *Nicaragua v. United States.* The court held that, because certain American actions were taken "several months after the major offensive of the armed opposition against the Government of El Salvador had been completely repulsed," the measures were unnecessary, and it was possible to "eliminate the main danger of the Salvadoran Government without the United States embarking on activities in and against Nicaragua." As to proportionality, the court said it could not regard the actions relating to the mining of Nicaraguan ports and attacks on port and oil installations as satisfying proportionality, and that United States help to the *contras* persisted too long after any aggression by Nicaragua could have reasonably been presumed to have continued.[18] Judge Schwebel detailed in his opinion the depredations in which insurgents in El Salvador had engaged, which were very similar to those that the United States allegedly supported. He explained that an action is proportional when it is necessary to end and to repulse an attack, not just when it corresponds exactly to the acts of aggression.[19] Mining of the harbors and attacks on oil installations could have been expected to restrict the flow of arms from Nicaragua's harbors and therefore to diminish Nicaragua's capacity to continue its aggression.

Most significantly, the court cannot safely impose a standard on States that requires them to abstain from the exercise of self defense on the assumption that no new offensive will be undertaken by an aggressor who retains the capacity to attack or to support an attack. Courts must leave such delicate and dangerous predictions within the reasonable discretion of individuals assigned the responsibility for protecting their nationals. Sound military strategy must govern such tactical decisions, not retrospective second-guessing of judges.

The limitations of necessity and proportionality are traditional, civilizing constraints on the use of force. Respect for such traditional doctrine is undermined, however, when States are expected to accept too high a degree of risk of substantial injury before being allow-

[18] *Nicaragua v. United States*, 1986 I.C.J. at 122.
[19] *Id.* at 269-70, 367 (Diss. Op. Schwebel, J.).

ed to defend themselves or to accept a continuation of unlawful aggression because of a tit-for-tat limit on military response. The law should not be construed to prevent military planners from implementing measures they reasonably consider necessary to prevent unlawful attacks.

C. RESPONSIBILITY FOR AGGRESSION

The exercise of self defense must be based on adequate proof of responsibility. This obvious principle creates no serious problem in connection with conventional uses of force. States generally act openly in using force against each other, or they utilize their own secret services for undercover work. In those situations, responsibility is clear in principle, though proof of responsibility for undercover work may be difficult to obtain. Establishing responsibility for acts of state-supported terrorism is far more difficult.

Placing responsibility for acts of terrorism is more than merely a problem of proof. Controversy and uncertainty exist as to the extent to which States that protect or support terrorist groups can legally be held responsible for the acts of such groups. Furthermore, terrorist groups commonly seek to avoid responsibility for the acts of their members. Developing appropriate rules to govern these issues is a matter of grave importance and sensitivity. The most dangerous terrorists are those from established groups that are secretly utilized by States. States have the resources to provide such groups with the training, equipment, support, and instructions that enable them to inflict far greater damage than would be possible by independent agents.

Terrorist groups often try to avoid being identified as the perpetrators of acts that they believe might result in their being held accountable. Frequently, phony claims of responsibility will be issued, to attempt to divert suspicion and scrutiny from the true perpetrators, who will deny having been responsible. Some groups will operate in a manner that makes the assignment of responsibility to a particular organization especially difficult. Abu Nidal is said to work with extremely small cells, each composed of individuals who know nothing about the others or of the central command. The Palestine Liberation Organization (PLO) operates through an organization that enables its political arm to claim a lack of responsibility for the actions of its military arm (including their terrorist operations). Established groups residing in a particular country, such as the Popular Front for the Liberation of Palestine (PFLP) in Syria, have attempted

to disclaim responsibility for the actions in other countries of its individual members by asserting that those specific acts were unauthorized.

Some have suggested that an organization such as the PLO should be permitted to disclaim responsibility for the acknowledged actions of groups within their overall structure. This standard is inconsistent, however, with the law of criminal responsibility in the United States. The general rule followed in the state and federal courts is that a person is guilty of a crime, not only when he or she commits it, but also when he or she does or omits something for the purpose of aiding another person to commit it or abets in any way its commission, such as providing the means, training, facilities, or information that may assist in or facilitate commission of the proscribed acts.[20] A corporation or group is responsible for the acts of its authorized agents,[21] and the concept of apparent authority requires that principals exercise reasonable care to prevent any action that could reasonably lead a third person to infer that an agent has actual authority to engage in the conduct at issue.[22]

These rules in fact reflect the governing law throughout the world's legal systems. As Professor Tom Franck concluded on the basis of an extensive survey, "the approach to criminal complicity is strikingly similar among all legal systems. The domestic law of all civilized states [has] recognized that persons who aid or abet other persons are guilty of the (or another) offense."[23] The widespread acceptance of these rules is significant in determining proper international behavior. Where domestic laws constitute "general principles of law recognized by civilized nations," they become a source of international law, as defined in article 38 of the Statute of the ICJ. Principles recognized by civilized nations have been relied on by the ICJ in formulating international law in several cases.[24]

Two relatively recent actions signal our increasing impatience with the claim that an organization can successfully disclaim responsibility

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[20]*E.g.*, Am. Law Institute, Model Penal Code § 2.06 (1962); 18 U.S.C. § 2 (1982); Devitt & Blackmar, 1 Federal Jury Prac. & Proc. § 12.01 (1977).

[21]*E.g.*, Am. Law Institute, Model Penal Code § 2.07 (1962); Devitt & Blackmar, 1 Federal Jury Prac. & Proc. § 12.07 (1977); *id.* at 176-77 (1988 Supp.) (interpreting 18 U.S.C. § 2 with respect to agency).

[22]*E.g.*, Am. Law Institute, Restatement (Second) of Agency § 27 (1958).

[23]Franck & Niedermeyer, Accommodating Terrorism: An Offense Against the Law of Nations, unpublished manuscript, at 7 (1989) (to be published in Tel Aviv University Law Review).

[24]International Status of South West Africa Case, 1950 I.C.J. 146, 148 (Sep. Op. McNair, J.) (Advisory Opinion).

for the acknowledged actions of individuals or groups within their overall structure. Congress, in the Anti-Terrorism Act of 1987, found that the PLO is a terrorist organization, based on acts undertaken by terrorist components of the organization.[25] This finding implicitly rejected the notion that the PLO Council and its principal political body, Fatah, could avoid responsibility for the actions of the likes of Abu Abbas, a Council member, and the group that he directs (the Palestine Liberation Army). In 1988, moreover, Secretary Shultz denied a visa application to PLO leader Yassir Arafat on the ground that he should be held personally responsible for the terrorist activities of a group within the PLO that serves as Arafat's security force.[26] This action called an end to a long indulgence of Mr. Arafat's two-faced positions. Further, it may well have played a part in leading the PLO leader to make the declaration concerning terrorism that enabled the U.S. to enter into a dialogue with the PLO to help bring peace for Israel and justice for the Palestinians.

The U.S. should apply to terrorist organizations the same standards of responsibility that are applied in any legal system that deals with such issues. In terms of criminal law enforcement, prosecutors have made a strong case for applying to terrorist groups statutes making it a separate crime to commit certain acts through a conspiracy or through the use of techniques associated with racketeering organizations.[27] In protecting our national security the test should be no more exacting.

States that sponsor terrorism have an even greater capacity to evade responsibility than the terrorist groups they support. First, they attempt to keep secret the training and assistance they extend. A particularly useful arrangement in this respect is the channeling by States of assistance to terrorist groups outside their borders. Secrecy is not a major concern, however, given the present widespread acceptance of the premise that States can do virtually anything short of ordering a terrorist act or participating in its execution and still avoid being treated as responsible. For years States have supplied funds, arms, and sanctuary to known terrorist organizations without being treated as having responsibility for the terrorist actions. In such

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[25]Pub. L. 100-204, *codified at* 22 U.S.C. §§ 5201-5203 (1982).

[26]Dep't Statement (Nov. 26, 1988), *reprinted in* Dep't of State Bull. 53 (Feb. 1989).

[27]Racketeer Influenced and Corrupt Organization Act, *codified beginning at* 18 U.S.C. § 1961; *compare* United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) (government failure to show "financial purpose" of terrorist organization's acts requires dismissal of RICO indictment) *with* United States v. Bageric, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840, 917 (1983) (because terrorist organization perpetrated the "classic economic crime" of extortion more than 50 times, elements of RICO offense satisfied).

situations, States claim they have no knowledge of or do not support terrorist actions, and they explain their support for the groups involved on the ground that the groups have other, legitimate purposes. A claim currently made by States allowing terrorist groups sanctuary within their borders is that they have warned the groups not to commit terrorist acts and that they are prepared to punish or to expel any terrorist that is proved to be guilty of a terrorist act.[28]

The ICJ has recently provided States that assist terrorist groups with important support in their attempt to evade responsibility for the terrorist conduct of such groups in other States. In *Nicaragua v. United States* the court ruled that U.S. support for the *contras* was not extensive enough to make the U.S. responsible for the *contras*' actions in Nicaragua. (The U.S. was held responsible only for its own actions, such as the mining of the harbors.) The extent of U.S. support for the *contras* found by the court was significant, however, and included financing for food and clothing, military training, arms, and tactical assistance. The court concluded, nonetheless, that these forms of support were insufficient to hold the U.S. accountable, because the *contras* remained autonomous: "The Court does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are *subject to* the United States to such an extent that any acts they have committed are imputable to that State."[29]

The United States at no time during the *Nicaragua* litigation advanced as a defense for its support for the *contras* the claim that it had no responsibility for their actions. Any U.S. support for the *contras* was based on the belief that such support is legitimate as a measure of collective self defense in light of Nicaragua's support of communist revolutions in El Salvador, Honduras, and eventually all of Central America. The court's ruling in the litigation had the effect of relieving the U.S. of liability for *contra* activities and thereby limiting the effect of the court's ruling on liability. But the long-run consequences of this ruling will be as pernicious to peaceful relations among States as the court's rulings limiting the scope of self defense. The rulings on self defense will have the effect of restricting the effectiveness of responses to aggression and thereby will encourage aggression by reducing the deterrent capacity of States. The ruling on State responsibility will have the effect of reducing the costs imposed on States for supporting aggression and for assisting groups they know intend to engage in unlawful acts.

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[28]*E.g.*, statement of President Assad of Syria, in *Time*, April 3, 1989, at 30.
[29]*Nicaragua v United States*, 1986 I.C.J. at 65 (emphasis added).

Here, too, the court had no basis in established practice or custom to limit so drastically the responsibility of States for the foreseeable consequences of their support of groups engaged in illegal actions, whether the actions are called "armed resistance" or whether the perpetrators are called terrorists. Established principles of international law and many specific decisions and actions strongly support the principle that a State violates its duties under international law if it supports or even knowingly tolerates within its territory activities constituting aggression against another State. As Judge Schwebel noted in his dissent in *Nicaragua*, the U.N. Definition of Aggression proscribes not only the "sending" of "armed bands, groups, irregulars, or mercenaries" to carry out "acts of armed force" but also any "substantial involvement therein." He pointed out that Nicaragua had been substantially involved in the acts of armed force by the Salvadoran insurgents.[30]

Several decisions of arbitral tribunals have granted substantial damages against States for failing to prevent persons within their jurisdictions from conducting hostile activities against other States. The U.S. was awarded $15,500,000 in a proceeding against Britain (*The Alabama*) for allowing a Confederate warship to be completed and to leave British territory, thereafter capturing or destroying more than sixty Union vessels.[31] In the *Texas Cattle Claims* arbitration the American-Mexican Claims Commission found Mexico liable on four legal bases for raids into Texas by outlaws or military personnel:

> (1) active participation of Mexican officials in the depredations; (2) permitting the use of Mexican territory as a base for wrongful actions against the United States and the citizens thereof, thus encouraging the wrongful acts; (3) negligence, over a long period of years, to prosecute or otherwise to discourage or prevent the raids; and (4) failure to cooperate with the Government of the United States in the matter of terminating the condition in question.[32]

The ICJ held Israel responsible in 1948 for failing to "render every assistance" to prevent the assassination of Prince Bernadotte, the U.N. mediator.[33] And in the *Corfu Channel Case* as well as the *Iran*

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[30]*Id.* at 343-44 (Diss. Op. Schwebel, Jr.).

[31]7 Moore's Digest of Int'l Law 999 (1970).

[32]American Mexican Claims Comm'n, Report to the U.S. Secretary of State, *reprinted in* 8 Whiteman Digest of Int'l Law at 748, 753 (1967).

[33]Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 184-85 (Advisory Opinion).

Hostage Case, the ICJ found that Albania and Iran, respectively, had a duty under international law to make every reasonable effort to prevent illegal acts against foreign States and had acted unlawfully by knowingly allowing its territory to be used for illegal acts.[34]

The U.S. position on this issue has been stated in cases, by scholars, and in explanations for actions taken against States that support terrorists. The Supreme Court said in 1887, for example, in a case involving counterfeiting of Bolivian bank notes, that "[t]he law of nations requires every national government to use due diligence to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof."[35] In a recent decision, involving the seizure by the U.S. of Fawaz Yunis in international waters, District Judge Barrington Parker commented on the international law duty of States to prosecute or to extradite hijackers. He said that nations cannot be permitted to seize terrorists anywhere in the world in an unregulated manner. Governments must act in accordance with international law and domestic statutes. But he said that where a State, such as Lebanon, is "incapable or unwilling . . . [to] enforce its obligations under the [Montreal] Convention," or when a government "harbors international terrorists or is unable to enforce international law, it is left to the world community to respond and prosecute the alleged terrorists."[36]

The ultimate remedy for a State's knowingly harboring or assisting terrorists who attack another State or its citizens is self defense. In December 1985 several airline passengers were killed by terrorists in simultaneous attacks at the Rome and Vienna airports, including five Americans; many more were wounded. Some of the terrorists had in their possession Tunisian passports taken by Libyan authorities from Tunisian workers excluded from Libya. In addition, immediately after these attacks, in which eleven-year-old Natasha Simpson and other civilians were killed, Qadhafi of Libya publicly hailed the killers as "heroes." These facts, together with Qadhafi's record of activities and statements, led the U.S. to impose on Libya all remaining sanctions short of force and to make clear that Libya would be held responsible for the actions of terrorists whom it supported. President Reagan announced:

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[34]Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, 22 (Judgment on the Merits); Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 32-33, 36.

[35]United States v. Arjona, 120 U.S. 479, 484 (1887).

[36]United States v. Yunis, 681 F. Supp. 896, 906-07 (D.D.C. 1988).

> By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he [Qadhafi] had used its own armed forces .... If these [economic and political] steps do not end Qadhafi's terrorism, I promise you that further steps will be taken.[37]

In a speech at the National Defense University on January 15, 1986, Secretary Shultz repeated the point:

> There should be no confusion about the status of nations that sponsor terrorism against Americans and American property. There is substantial legal authority for the view that a state which supports terrorist or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsible for such attacks. Such conduct can amount to an ongoing armed aggression against the other state under international law.[38]

Despite these warnings, the U.S. learned in April 1986 that Libya was involved in two major terrorist incidents against Americans during that month and that Libya was in the process of planning others. In Paris, terrorists who were acting in part on Libya's behalf or with its support planned to attack persons lined up for visas at the U.S. Embassy. The attack contemplated—with automatic rifles and grenades—would have resulted in substantial loss of life, but it was thwarted through excellent intelligence work by U.S. and French services. Another attack was planned against a disco in Berlin that was frequented by U.S. military personnel. Efforts to thwart this attack were unsuccessful, and a bomb exploded in the disco on April 5, 1986, killing at least one civilian and two U.S. servicemen and injuring some fifty others. Intelligence established Libya's culpability, as well as its plans for further attacks. This led to President Reagan's decision to bomb terrorist-related targets in Libya.

The case for holding Libya responsible for the Berlin disco bombing and for a pattern of other prior and planned terrorist actions was very strong. Some particularly sensitive aspects of the case were made public, at a substantial price in terms of U.S. intelligence capabilities. The President decided in that instance, after public

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[37]Weekly Compilation of Presidential Documents 17-18 (Jan. 7 1986).

[38]Address Before the National Defense University, Jan. 15, 1986, *reprinted in* Dep't of State Bull. 15, 17 (March 1986).

statements had already been made by other officials revealing a source of our information, that a degree of public disclosure was appropriate. While members of the press and some others have raised questions about the sufficiency of the case against Libya, they did so largely on the ground that other evidence pointed to Syria as having been involved. In general, however, the case against Libya was accepted, and numerous States showed the seriousness with which they regarded this matter by cutting the staffs at Libya's embassies in their countries, thereby materially reducing Libya's capacity to assist terrorists and to engage in other illegal activity.

After Libya's overt actions in 1986, we should expect States that support terrorists to be more careful in their planning. When we learn, however, that any official, agency, or party in a State is materially involved in an incident, that should be treated as strong evidence of State responsibility. No requirement should be imposed that the head of state, for example, be shown to have personally approved an action or policy before a State is considered responsible. Furthermore, even if no evidence is developed that a State is directly responsible for specific acts, the State's general and continuing support for a group known to be engaged in terrorism should suffice to establish responsibility for aiding or conspiring, if not as a principal in the crime itself. Differences in the degree of proof of actual approval by a State of specific terrorist acts should operate to vary the degree of responsibility and the remedies imposed, rather than to permit a State to exploit the high standard of proof that should govern in determining the propriety of resorting to self defense.

Finally, the case publicly made by the U.S. against Libya should not be regarded as the standard of proof for holding States responsible for supporting terrorist groups. The public revelation of sensitive information should not be considered a routine procedure to which the U.S. or other States are expected to adhere. We will seldom be able to convince States to arbitrate issues as sensitive as their responsibility for terrorism. We will often be unable ourselves to litigate such issues because of limits on our willingness to reveal the sources and nature of evidence we obtain. We cannot, however, treat our national security interests in such cases as though they are solely legal claims to be abandoned unless they can be proved in a real court or in the court of public opinion. Our inability to justify actions in self defense with public proof will inevitably and quite properly affect our willingness to resort to the most serious remedial options. But no formal requirement of public proof should govern our actions in such cases.

D. TERRITORIAL INTEGRITY

The principle of territorial integrity is a major—and proper—legal constraint to taking actions against terrorists or States that support terrorism. World-class terrorists need bases in which to live and work, to train, to store their weapons, to make their bombs, and to hold hostages. The States in which they locate are almost invariably unable or unwilling to extradite them. An extradition request in such cases will do nothing more than reveal that we know their location, an advantage that would thereby be squandered. The only possible remedies against such terrorists often would require infringement of the territorial integrity of the State in which they are located.

Breaches of territorial integrity are always serious. Control over territory is one of the most fundamental attributes of sovereignty. Law enforcement or military personnel who participate in an operation that infringes this principle risk being treated as criminals, subject to severe penalties. On a political level, such actions are regarded by all States—even those who have failed to perform their duties under the law—as deeply offensive and threatening. In much of the world, interventions by the great powers, even for the purpose of upholding international law, are synonymous with imperialism.

Nonetheless, territorial integrity is not entitled to absolute deference in international law, and our national defense requires that we claim the right to act within the territory of other States in appropriate circumstances, however infrequently we may choose for prudential reasons to exercise it. Territorial integrity is not the only principle of international law that deserves protection. All States are obliged to control persons within their borders to ensure that they do not utilize their territory as a base for criminal activity. Most States have also voluntarily undertaken to prosecute or to extradite persons for the most common terrorist crimes, such as air piracy and sabotage.[39] When States violate these obligations, and especially when they are implicated in the conduct of the terrorists involved, other States are seriously affected. These States are left in some cases

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[39]Recent affirmations of these principles include a report of The Hague Academy of International Law, *The Legal Aspects of International Terrorism*, 1988 Academie Du Droit 15-17 (Frowein, J.A. Reporter). The same conclusions are reached by Professor Oscar Schachter. Schachter, *supra* note 13, at 310-11. He regards the obligation to prosecute or to extradite suspected terrorists as "now accepted customary international law." *Id.* at 311. Principle 2.1 of the Hague Academy's report finds an additional obligation of States "to furnish information available to them to other states if that information is relevant to prevent terrorist acts affecting human lives in an indiscriminate manner." *The Legal Aspects of International Terrorism*, *supra*, at 16; *see also id.* at 61.

with no option for ending the threat from such terrorists short of violating in some manner the territorial integrity of the State that has violated its own international responsibilities.

1. Hostage Rescue

A State seeking to rescue its own citizens would appear to have an especially strong case for infringing the territorial integrity of another, especially where its failure to act is likely to result in irreparable injury. This was the position taken by the United States and by many other States after Israel rescued its citizens at Entebbe, Uganda, from hijackers of an Air France jet forced to land there in an action in which three hostages, one Israeli soldier, seven terrorists, and a number of Ugandan soldiers were killed. The hijackers had received the support of the Ugandan government, which made no effort to defuse the situation.

In response to complaints that Israel had conducted an "act of aggression," the United States and the United Kingdom supported a Security Council Resolution condemning hijacking and terrorism but also reaffirming the sovereignty and territory of all States. Ambassador William Scranton defended Israel's action, even though it involved a violation of Uganda's territorial integrity. He said:

> Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally such a breach would be impermissible under the Charter of the United Nations. However, there is a well-established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located either is unwilling or unable to protect them. The right, flowing from the right of self defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury. . . .
>
> It should be emphasized that this assessment of the legality of Israeli actions depends heavily on the unusual circumstances of this specific case. In particular, the evidence is strong that, given the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impracticable.[40]

[40]Statement before the U.N. Security Council on July 12, 1976, *reprinted in* Dep't of State Bull. 181, 181-82 (Aug. 2, 1976).

2. Attacks on Terrorists and Terrorist Camps

The United States also supports the right of a State to strike terrorists within the territory of another State where the terrorists are using that territory as a location from which to launch terrorist attacks and where the State involved has failed to respond effectively to a demand that the attacks be stopped. On October 1, 1985, Israeli jets bombed the PLO headquarters in Tunis, asserting that it was being used to launch attacks on Israel and Israelis in other places. The United States denounced the bombing and abstained from voting on a Security Council resolution that, among other things, condemned "vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct."[41]

The United States opposed the Israeli action, however, on the basis of policy, not legal, considerations. The extent to which Israel had communicated its position in advance was unclear. The United States in fact supported the legality of a nation attacking a terrorist base from which attacks on its citizens are being launched, if the host country either is unwilling or unable to stop the terrorists from using its territory for that purpose. In abstaining on the resolution concerning the bombing of PLO headquarters, Ambassador Vernon Walters stated that the U.S. regarded such an attack as a proper measure of self defense where it is necessary to prevent attacks launched from that base:

> We, however, recognize and strongly support the principle that a state subjected to continuing terrorist attacks may respond with appropriate use of force to defend against further attacks. This is an aspect of the inherent right of self-defense recognized in the U.N. Charter. We support this principle regardless of attacker and regardless of victim. It is the collective responsibility of sovereign states to see that terrorism enjoys no sanctuary, no safe haven, and that those who practice it have no immunity from the responses their acts warrant. Moreover, it is the responsibility of each state to take appropriate steps to prevent persons or groups within its sovereign territory from perpetrating such acts.[42]

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[41]U.N. Sec. Council Res. 573, *reprinted in* Off. of the Historian, U.S. Dep't of State, 1985 Am. Foreign Policy Current Doc. 517.

[42]Statement before the U.N. Security Council on October 4, 1985, *reprinted in* Off. of the Historian, U.S. Dep't of State, 1985 Am. Foreign Policy Current Doc. 581.

In contrast to an attack on a terrorist base in self defense, the United States opposes peacetime attacks on a State's facilities on the mere possibility that they may someday be used against the attacking country. Thus, the U.S. supported a Security Council resolution condemning Israel's bombing in 1981 of a nuclear reactor in Iraq, in the absence of any evidence that Iraq had launched or was planning to launch an attack that could justify Israel's use of force and because Israel had not fully explored peaceful ways of alleviating its concerns.

A State Department spokesman stated that the United States "had no evidence that Iraq violated its commitment" under the Non-Proliferation Treaty to safeguard nuclear activities.[43] And Ambassador Jeanne Kirkpatrick explained: "We believe the means Israel chose to quiet its fears about the purposes of Iraq's nuclear program have hurt, not helped the peace and security of the area. In my government's view, diplomatic means available to Israel had not been exhausted . . . ."[44] The violation of a State's territorial integrity must be based on self defense. While Israel's anxiety concerning Iraq's intentions may have been reasonable, the presence in a State of the military capacity to injure or even to destroy another State cannot itself be considered a sufficient basis for the defensive use of force.

The use of force in a foreign territory to defend against terrorists will sometimes take the form of an attack aimed at one or more individuals. The standard by which the propriety of such attacks should be judged is the same applied to more general attacks. Attacks aimed at specific individuals potentially involve claims of "assassination," which is prohibited by an Executive Order, the scope of which is discussed below. When such attacks are lawful under international law, and therefore are not an "assassination," they are often less damaging to innocent persons than bombings and other less discriminate actions. Yet we seem to disfavor such conduct. The U.S. is obliged in principle, by international law and by sound ethics, to utilize the most discriminating measures reasonably possible in exercising self defense.

3. Abductions

Another highly controversial form of action that violates territorial sovereignty is what is commonly called an "abduction" in interna-

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[43]Remarks by U.S. Dep't of State Spokesman Fischer on June 8, 1981, *reprinted in* Off. of the Historian, U.S. Dep't of State, 1981 Am. Foreign Policy Current Doc. 684.

[44]Statement before the U.N. Security Council on June 9, 1981, *reprinted in* Off. of the Historian, U.S. Dep't of State, 1981 Am. Foreign Policy Current Doc. 687, 688.

tional law. An abduction is the forcible, unconsented removal of a person by agents of one State from the territory of another State. American law enforcement officials, relying on recent statutes making terrorist attacks on Americans overseas federal crimes, like to refer to abductions as "arrests." The availability of a U.S. law on which to base the issuance of a warrant may provide law enforcement personnel with the authority to act under U.S. law; it provides no authority, however, to act under either international law or the law of the State whose territorial sovereignty is breached. To be acceptable under international law an abduction must satisfy far more exacting standards than the mere availability of an arrest warrant issued by the State responsible for the action.[45]

Abductions are controversial, politically risky, and dangerous to the individuals assigned the task. The only abductions carried out during the Reagan Administration were in international airspace and in international waters. The forcible removal of a person, especially one being protected by a State hostile to the State conducting the abduction, will be treated as criminal conduct, amounting at the least to a kidnapping. In the course of such an operation, individuals may be killed, leading to charges of murder. Where the State from which the person is taken is not hostile but refuses to extradite the person seized for reasons of policy, an abduction is likely to cause a severe strain on relations.

Abductions have occurred historically, however, with remarkable frequency. Generally, they have been undertaken without prior consultation with authorities in the State involved, presumably in order to avoid a clear refusal to extradite or to surrender the individual seized. Almost invariably, the State responsible for an abduction has apologized for the violation of the other State's sovereignty, and often the individual seized is returned to the State from which he was taken. But once an apology is made, States have sometimes permit-

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[45]There are also domestic law considerations. In a 1980 opinion on this subject, the Department of Justice stated that the FBI lacks domestic authority to undertake extraterritorial law enforcement actions in violation of another country's territorial sovereignty without that country's consent. U.S. Dep't of Justice, Extraterritorial Apprehension by the Federal Bureau of Investigation, 4B Opinions of Legal Counsel 543, 544, 553 (1980). A revised opinion issued by the Department of Justice on June 21, 1989, concluded that as a matter of domestic law, such actions could be authorized under certain circumstances. For a description of the later opinion, see Statement of William P. Barr (Ass't Attorney General, Office of Legal Counsel, U.S. Dep't of Justice), *The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities That Depart From International Law: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 101st Cong., 1st Sess. (Nov. 8, 1989).

ted the person abducted to remain in the control of the State to which he was taken.[46]

A significant degree of tolerance of abductions is reflected by two widely accepted practices. First, States that abduct individuals often find a way to retain and to prosecute them, with or without the consent of the State from which they are taken. Second, we are aware of no State that treats an abduction as an illegal arrest for purposes of its own law when the abducted individuals are being prosecuted. The Supreme Court of the United States, for example, has consistently held "that the power of a court to try a person for crime is not impaired by the fact that he [has] been brought within the court's jurisdiction by reason of a forcible abduction."[47] The widespread acceptance of this practice—reflected in the Latin principle *male capere bene detentio* (bad capture, good detention)—suggests that States do not consider abductions offensive enough to deter them through some form of prophylactic rule or as reflecting any individual right beyond the requirement of fair treatment.

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[46]In addition to the Eichmann case, see *infra* notes 48-49 and accompanying text, several instances have resulted in diplomatic solutions that have permitted the abducting State to prosecute the fugitive. In 1863, for example, the Canadian Government abducted two persons and brought them back to Canada for trial. After an official complaint by the United States, the Canadian Government apologized and offered to return the two. Satisfied with the apology, the U.S. permitted the two men to be tried in Canada for their felonies. 4 Moore's Digest of Int'l Law 329 (1906). *See also* Current Notes, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 Am. J. of Int'l Law 502, 506 (1935) (abduction in Switzerland by Germany); O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 Brit. Y.B. on Int'l Law 279, 281-82 (1960) (abduction, conviction and execution by England in the face of Spanish diplomatic protests). In other instances, abductions led to prosecution where no diplomatic protest was made. Max Planck Institute for Comparative Pub. Law and Int'l Law, 8 Enyclopedia of Pub. Int'l Law 357 (1985) (discussing several cases of prosecution after abduction).

In addition to the materials cited above, for discussion of the practice of abduction, see, e.g., J. Moore, 1 Extradition and Int'l Rendition 281-302 (1891); 2 Moore's Digest of Int'l Law 333-36 (1906); Hyde, *Notes on Extradition Treaties of the U.S.*, 8 Am. J. of Int'l Law 487, 499-501 (1914); Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of Int'l Law*, 28 Am. J. of Int'l Law 231 (1934); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 British Y.B. of Int'l Law 265 (1952); I. Shearer, Extradition in Int'l Law 72-76 (1971); Bassiouni, *Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition*, 7 Vand. J. of Transnat'l Law 25 (1973); Note, *Extraterritorial Jurisdiction and Jurisdiction following Forcible Abduction*, 72 Mich. L. Rev. 1087 (1974); Horbaly & Mullin, *Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas*, 71 Mil. L. Rev. 1 (1976); Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition*, 57 Or. L. Rev. 51 (1977); Recent Development, *U.S. Legislation to Prosecute Terrorism*, 18 Vand. J. of Transnat'l Law 915 (1985); Findley, *Abducting Terrorists Overseas for Trial in the United States*, 23 Tex. Int'l L.J. 16 (1988).

[47]Frisbie v. Collins, 342 U.S. 519, 522 (1952). In Ker v. Illinois, 119 U.S. 436 (1886), for example, the Court affirmed the conviction of a person tried in an Illinois court after he had been abducted in Peru and brought back to the U.S. for trial.

While non-consensual abductions from foreign States should rarely be undertaken, the U.S. reserves the right to engage in this type of action for essentially three reasons. First, for internal political reasons, a State may be unwilling to extradite an accused terrorist or to give its explicit, public consent to his removal. Unofficially, however, the State, or some official of the State, may be prepared to allow the individual to be removed without granting formal consent and may even offer some cooperation in carrying out the action. The appearance that the U.S. had abducted the individual involved could serve in such cases as a cover for the other State's secret cooperation.

Second, an abduction may be necessary where the target is an extremely dangerous individual accused of grave violations of international law. Israeli agents abducted the infamous war criminal Adolf Eichmann from Argentina and brought him before an Israeli court. Argentina protested Eichmann's seizure and initially demanded his immediate return. Upon Israel's refusal to return him, the Argentine Government brought the matter before the U.N. Security Council. The Security Council resolved that acts such as Eichmann's abduction, "which affect the sovereignty of a member state and therefore cause international friction, may, if repeated, endanger international peace and security"; but the resolution did not insist upon Eichmann's return and instead "request[ed] the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law."[48] Israel had previously apologized to Argentina for any violation of its sovereignty that may have occurred. Argentina later accepted this apology, coupled with the Security Council resolution, as an adequate remedy, and Israel proceeded to try, convict, and execute Eichmann.

The Eichmann case involved a notorious war criminal. As Ambassador Lodge noted during the Security Council debate, "the whole matter cannot be considered apart from the monstrous crimes with which Eichmann is charged."[49] The case nonetheless serves in principle as a precedent for the legal acceptability of abducting an individual suspected of crimes widely condemned in international practice. Today's terrorists have the capacity to kill hundreds, even thousands, of innocent people. Some individuals engaged in such acts

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[48]U.N. Security Council Res., U.N. Doc. S/4349 (June 24, 1960), *reprinted in* 5 Whiteman Digest of Int'l Law 211-12 (1965).

[49]Statement before the U.N. Security Council on June 22, 1960, *reprinted in* Dep't of State Bull. 115 (July 18, 1960).

will be appropriate subjects for abduction, especially when they are actively pursuing future actions that jeopardize hundreds more. In such cases, the traditional prerequisites of self defense may well be satisfied.

Finally, we retain the option of abducting terrorists to prevent them—and their State supporters—from assuming that they are safe from such unilateral action. To state publicly that the United States does not ever intend to abduct terrorists from other States would merely increase the freedom of terrorists to operate without anxiety. We must never permit terrorists to assume they are safe.

III. THE WAR POWERS RESOLUTION

The War Powers Resolution[50] is an important instance of domestic law that, when applied rigidly or unintelligently, creates serious obstacles to carrying out lawful and useful military operations against state-sponsored terrorists.

To begin with, the Resolution suggests that the President lacks authority under the Constitution to use the armed forces without prior legislative approval in those situations where such action has most often occurred and is most likely to recur in combatting terrorism. Thus, section 2(c) of the Resolution purports to recite the circumstances under which the President may introduce U.S. armed forces into actual or imminent involvement in hostilities. This list fails to include instances in which the armed forces are used to protect or to rescue Americans from attack, including terrorist attacks. The listing also fails to include the use of force to defend against attacks by state-sponsored terrorists on military personnel and equipment of the U.S. or of third States whom the President might decide to assist in defending. Whatever Congress might have intended by this omission in section 2(c), congressional leaders appear to agree that this section is not a complete listing of the situations in which the President may act without prior legislative approval.[51] Presidents should not be confronted with a legislative declaration that is still claimed by some to imply that prior legislative approval must be obtained for military actions abroad that are essential in the war on terrorism.

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[50]Pub. L. 93-148, *codified at* 50 U.S.C. §§ 1541-1548 (1982).

[51]See Monroe Leigh's well-known elaboration of the situations in which the President has the authority to introduce armed forces into hostilities, 94th Cong., 1st Sess., Subcomm. on International Security and Scientific Affairs, House Comm. on International Relations, *Hearings on War Powers: A Test of Compliance* (1975).

The Resolution creates another potential difficulty by requiring the President, in section 3, to consult with Congress "in every possible instance" before introducing U.S. armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." President Carter, on the advice of White House Counsel Lloyd Cutler, decided that consultation was not "possible" prior to the rescue mission in Iran. This construction of the word "possible" treats as impossible a consultation that would create an unreasonably great risk to life or to the success of a military mission. Consultation is in principle an essential form of cooperation between the President and Congress. The President, however, is responsible not only for defending the United States, but also for doing so successfully. The President must be answerable to Congress for using the armed forces, but not in a manner that jeopardizes his ability to achieve the purposes for which such forces are placed at his disposal. Counter-terrorist operations will sometimes require the highest possible level of secrecy, particularly those involving the rescue of hostages. The Resolution's language continues, however, to provide the basis for claims that the President must consult prior to any operation when it is literally possible to do so.

Perhaps the most disturbing aspect of the Resolution with respect to the nation's ability to combat state-sponsored terrorism is its effort to limit the length of time the President may use the armed forces in a military operation without legislative approval. Section 5 of the Resolution provides that, within sixty days after introducing armed forces into a situation involving hostilities or the imminent threat of hostilities, the President must terminate the use of the armed forces unless Congress has declared war or specifically authorized the use of such forces, has extended the sixty-day period, or is physically unable to meet as a result of an armed attack on the United States.

The Resolution's effort to force Presidents to withdraw the armed forces from situations involving hostilities absent specific legislative approval is highly questionable under the Constitution.[52] Putting

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[52]*E.g., The War Powers After 200 Years: Hearings Before the Subcomm. on War Powers of the Senate For. Relations Comm.*, 100th Cong., 2d Sess. 147 (testimony of Abraham D. Sofaer and comments of Senator Joseph Biden). Section 5(c) of the Resolution provides, for example, that the President must remove U.S. forces from hostilities "if the Congress so directs by concurrent resolution," a legislative veto provision that is unconstitutional. *See Chadha v. INS*, 462 U.S. 919 (1983). Some of these objections would be rectified by legislation proposed by Senators Byrd, Nunn, and Warner. *See* Sen. Joint Res. 323, 100th Cong., 2d Sess.

aside the constitutional objections to this provision, however, section 5 is objectionable on policy grounds as well. A sixty-day limit poses no problem for most counter-terrorist operations, particularly those aimed at terrorist groups. Nonetheless, military operations lasting beyond sixty days might sometimes be necessary against terrorist groups or States that sponsor such groups. In such instances, a law purporting to place an arbitrary time limit could undermine the nation's ability to conduct such operations successfully.

Congress, of course, has substantial legislative powers respecting the use of force. But the issue under section 5 is whether, even in the absence of any effort by Congress to exercise its powers in a specific context, the President should nonetheless be required to obtain legislative approval to continue such operations beyond the specified time limits. To require positive legislative action has had several undesirable results:

- Presidents have refused to accept this limitation, causing divisive inter-branch disagreement;
- Congress has felt compelled to consider and to debate whether to adopt legislation authorizing or terminating such operations within the sixty-day period, in order to prevent the appearance of having allowed Presidents to act inconsistently with the Resolution's purported limitations; and
- Observers of American government, including both our friends and enemies, have been led to believe by the Resolution and the debates it causes that the U.S. lacks the resolve and internal cohesion to follow through effectively on military commitments.

In addition to these general difficulties, the Resolution should be regarded as inapplicable to ordinary counter-terrorist activities. Thus, for example, counter-terrorist units should not generally be treated as "armed forces" for this purpose. Operations by such units are not of a traditional military character, and their activities are not ordinarily expected to lead to major confrontations with the military forces of another State. Counter-terrorist forces are not equipped for sustained combat with foreign armed forces, but only to carry out precise and limited tasks, particularly rescues and captures. The use of force by counter-terrorist units therefore is more analogous to law enforcement activity by police in the domestic context than it is to the "hostilities" between States contemplated by the War Powers Resolution.

Nothing in the Resolution's legislative history indicates that Congress intended it to cover deployments of counter-terrorist units. Con-

gress was concerned with "undeclared wars," such as the Vietnam War, rather than emergency or small-unit operations.[53] Congress was concerned about the stationing of troops abroad, but only in situations that could lead to imminent hostilities, rather than as a preparatory measure to permit the surgical operations that are intended for counter-terrorist actions.[54]

The Resolution's limited applicability to counter-terrorist forces could be recognized by Congress without interfering with its applicability to the use of conventional forces against facilities or forces of another State, even for counter-terrorist purposes. Thus, the self-defense operation against Libya on April 14, 1986, for example, though a counter-terrorist operation, would still fall within the intended scope of the Resolution.

IV. ASSASSINATION

Executive Order 12333, issued by President Reagan in 1981, states that "[n]o person employed or acting on behalf of the United States Government shall engage in, or conspire to engage in assassination."[55] This order, which remains in effect and is binding on all executive branch personnel, is derived from a virtually identical provision issued by President Ford in 1976.[56]

Prohibiting "assassination" is legally, militarily, and morally sound. Assassination is in essence intentional and unlawful killing—

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[53]*See War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92nd Cong., 1st Sess. 38 (Senator McGee); *id.* at 193-94 (Senator Eagleton); *id.* at 248 (Senator Pearson); *id.* at 334 (Senator Mathias).

[54]*See id.* at 336 (Rep. Findley); *see also id.* at 406 (WPR not intended to "hamstring legitimate presidential powers to respond to emergency situations"); *War Powers Legislation, 1973: Hearings Before the Senate For. Relations Comm.*, 93rd Cong., 1st Sess. 65 (Fullbright saying not directed against situations requiring immediate response to direct attack). *See also War Powers, Libya and State-sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, International Security and Science of the House For. Affairs Comm.*, 99th Cong. 2d Sess. 5-32 (Statement of Abraham D. Sofaer, U.S. Dep't of State Legal Adviser).

[55]Exec. Order No. 12333, 3 C.R.F. § 2.11, at 200, 213 (1982). For an excellent analysis of this prohibition, see generally Definition of Assassination, prepared by W. Hays Parks, Chief, International Law Branch, Int'l Affairs Div., Office of the Judge Advocate General, Dep't of the Army (Nov. 2, 1989). This analysis was coordinated with the legal offices of the Department of State, the Department of Defense, and the Central Intelligence Agency, as well as the Office of Legal Counsel of the Department of Justice and the National Security Council Legal Adviser.

[56]Exec. Order 11905, 3 C.F.R. § 5(g), at 90, 101 (1977). The only substantive change in the prohibition since that date is that the earliest version prohibited "political" assassination; the word "political" was deleted from the order by President Carter in 1978. Exec. Order 12036, 3 C.F.R. § 2-305, at 112, 129 (1979).

murder—for political purposes.[57] This society should not and need not authorize its military personnel or its special forces, any more than its police, to engage in murder for the alleged purpose of advancing our national security. Our nation has more to lose by engaging in such conduct than our moral standing. Assassinating high officials of foreign governments will tend to provoke similar conduct aimed at our own leaders, even though such retaliatory actions may have no proper basis. A limitation on assassination undoubtedly disadvantages the United States in a contest with States or groups that routinely resort to murder, even of citizens having nothing to do with their political objectives. But that is a price we are prepared to pay. What we must not permit is the improper use of the assassination prohibition to limit or to prevent the legitimate resort to lethal force in defending our nationals and friends.

The assassination prohibition is prone to overbroad application for several reasons. Americans have a distaste for official killing, and especially for the intentional killing of specific individuals. Furthermore, once published, a prohibition of this sort attracts public and congressional attention. Today, whenever the U.S. contemplates or undertakes a counter-terrorist operation in which an individual might be or is killed, claims are made in the press and in Congress that the death would be or was an assassination. The controversy associated with such debates—and the natural desire of officials to avoid controversial issues—leads them (and the agencies they represent) to shy away from such actions, even when they in fact involve no unlawful conduct. The enhanced reluctance to use lethal force that results is a serious detriment in the national security planning process.

The meaning of the term "assassination" in historical context, and in the light of its usage in the laws of war, is, simply, any unlawful killing of particular individuals for political purposes.

First, virtually all available definitions of "assassination" include the word "murder," which in law is a word of art. Murder is a crime, the most serious form of criminal homicide. That element is the most fundamental aspect of the assassination prohibition. All criminal killing is therefore potentially subject to the prohibition. Under no circumstances, however, should assassination be defined to include any lawful homicide. Assassination is also commonly defined as killing with a political purpose. Murders that have no political purpose or

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[57] *See* Webster's New Collegiate Dictionary 67 (1977); Oxford Companion to Law (1980). *See also* McConnel, The History of Assassination 12 (1969).

context are criminal and remain subject to punishment, but these too should not be characterized as assassinations. Other elements offered in available definitions seem superfluous or even misleading. Thus, for example, whether a killing is done "secretly" or "treacherously" and whether the person is "prominent" would appear to be of little or no consequence for purposes of the Executive Order. Nor should it matter that the assassin "kills in the belief that he is acting in his own private or public interest" or whether the action is "surprising" or "secret." The pivotal elements in terms of controlling the behavior of government officials would seem to be illegality and political purpose.[58]

Second, the historical background of the term casts considerable light on its meaning and strongly supports a definition limited to illegal, politically motivated killing. The Executive Order was adopted immediately after revelations and controvesy about the alleged role of the CIA in planning the killing of certain heads of state and other high officials. The House and the Senate conducted extensive investigations into the CIA's activities.[59] The Senate investiation gave special attention to the question of assassinations, publishing a 349-page report entitled "Alleged Assassination Plots Involving Foreign Leaders."[60] The Senate investigation explored the CIA's alleged role in assassination plots against five individuals: Patrice Lumumba, Premier of the Congo; Fidel Castro, Premier of Cuba; Rafael Trujillo, strongman of the Dominican Republic; Ngo Dinh Diem, President of South Vietnam; and Rene Schneider, Commander-in-Chief of the Army of Chile, who opposed a military coup against President Salvador Allende. The Senate Select Committee found that Agency officials might have undertaken these plots without express authorization from the President and that some Agency officials were

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[58] *See supra* note 56 and accompanying text; *see also* F. Ford, Political Murder 2 (1985); Webster's Ninth New Collegiate Dictionary (1984). U.S. law also establishes independent criminal offenses for attacks against U.S. governmental officials. Anyone who kills, kidnaps, or assaults the President, the Vice President, a Supreme Court Justice, a Congressman, a cabinet official, or a member of the Presidential staff may be prosecuted. 18 U.S.C. § 351 (1982) (in Chapter on "Congressional, Cabinet, or Supreme Court Assassination"); 18 U.S.C. § 1751 (1982) (in chapter on "Presidential and Presidential Staff Assassination").

[59] *See U.S. Intelligence Agencies and Activities: Hearings Before the House Select Comm. on Intelligence*, 94th Cong., 1st & 2d Sess. Parts 1-6 (1975-76); *Intelligence Activities—Senate Res. 21: Hearings Before the Senate Select Comm. to Study Government Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. Volumes 1-7 (1975).

[60] Alleged Assassination Plots Involving Foreign Leaders: An Interim Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities (Norton & Co. 1976).

operating under the assumption that such actions were permissible. In its final recommendations, the Senate committee endorsed President Ford's adoption of the original Executive Order prohibiting "political assassination" and proposed a legislative ban on all "political assassinations."[61]

This background makes clear that the initial ban on assassination was adopted in response to allegations concerning planned killings of heads of state and other important government officials. All the plots examined by the Committee would have been illegal if instigated by a foreign government, in that no effort was made to justify any of them as an act of self defense or on any other legally sufficient basis. Furthermore, the prohibition's background also indicates that it should not be limited to the planned killing only of political officials, but that it should apply to the illegal killing of any person, even an ordinary citizen, so long as the act has a political purpose.[62] Conversely, this background—and the types of killings being criticized at the time—lends no support to applying the Executive Order to lawful killings undertaken in self defense against terrorists who attack Americans or against their sponsors.

An examination of the laws of war also supports limiting the assassination prohibition to illegal killing. The most fundamental protection that the laws of war extend to combatants is the right to use lethal force against any person who is a legitimate military target. Combatants are permitted in such operations to attack any opposing combatant (including supply or command personnel), or any other proper military target, through any proper military means (land, sea, air, artillery, commando, etc.). In addition, one of the harsh but accepted consequences of military operations is the collateral death of noncombatants pursuant to lawful attacks.

The raid on Libya in 1986 has been challenged as an effort (in part) to kill Colonel Qadhafi and therefore as an "assassination." The raid

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[61]Foreign and Military Intelligence: Final Report of the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities, 94th Cong. 2d Sess. 448 n.29.

[62]During the years after President Ford adopted Executive Order 11,905, several bills were introduced in Congress to convert the ban to a legislative one. A bill in the House of 1976 would have mandated that "whoever, except in time of war, while engaged in the duties of an intelligence operation of the government of the United States, willfully kills *any person* shall be imprisoned for not less than one year." H.R. 15,542, 94th Cong., 2d Sess. § 9(1) (1976). This effort to cover all such killings might explain the issuance in 1978 of a new Executive Order prohibiting any "assassination," not only "political" assassination.

was a legitimate military operation, however, in which the U.S. attacked five separate military targets, all of which had been utilized in training terrorist surrogates. Some U.S. policy makers may have been aware that Colonel Qadhafi used one of the target bases as one of several places in which he lived, but that fact did not make the base involved an illegitimate target. Nor was Colonel Qadhafi personally immune from the risks of exposure to a legitimate attack. He was and is personally responsible for Libya's policy of training, assisting, and utilizing terrorists in attacks on U.S. citizens, diplomats troops, and facilities. His position as head of state provided him no legal immunity from being attacked when present at a proper military target.

Limits do exist on targeting, even of military personnel, in the course of legitimate military operations. U.S. Army General Order No. 100 (paragraph 148), promulgated in 1863, defines "assassination" to prohibit making any particular person in a hostile country an "outlaw" to be killed without the benefit of ordinary limitations:

> *Assassination.* The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage ....

This rule, consistent with the views of early writers of international law, continues to guide American forces. Enemy combatants who fall into our hands, for example, may not be summarily executed, however heinous their personal misdeeds. At the same time, this rule has never been understood to preclude military attacks on individual soldiers or officers, subject to normal legal requirements. U.S. Army Field Manual 27-10 provides in this regard (paragraph 31):

> (Article 23b, Hague Regulations, 1907) is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive." It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.

Attacks on individual officers have been authorized and their legality has been accepted without significant controversy. Among the most

famous of these was the deliberate downing by the United States, on April 18, 1943, of a Japanese military aircraft known to be carrying Admiral Yamamoto.

An interesting recent case, characterized by some Reagan Administration officials as a "political assassination," was the killing of Abu Jihad, the PLO's top military strategist. On April 16, 1988, commandos apparently landed at Tunis, entered the home of Abu Jihad by killing several guards, and then killed the PLO leader but left his family unharmed. The commandos wore no insignia, utilized masks to cover their faces, and no nation or group thereafter claimed (or admitted) responsibility for the operation. Under these circumstances, the U.S. abstained in the Security Council on a resolution that condemned the action as a violation of Tunisia's territorial integrity. The U.S. representatives expressed disapproval of political assassination, but declined to vote for the resolution because it was one-sided.[63]

The attack is widely believed to have been launched by Israel. Some commentators, relying on this assumption, criticized the Reagan Administration for its position, arguing that Israel had ample basis for killing Abu Jihad as a measure of self defense. Abu Jihad is accused of being personally responsible for several terrorist attacks in the occupied territories and in Israel proper, including an assault on a civilian bus that resulted in three Israeli and three Palestinian deaths. These allegations, if true, might establish the potential legality of the target but would not alone legitimize an attack. While the U.S. regards attacks on terrorists being protected in the sovereign territory of other States as potentially justifiable when undertaken in self-defense, a State's ability to establish the legality of such an action depends on its willingness openly to accept responsibility for the attack, to explain the basis for its action, and to demonstrate that reasonable efforts were made prior to the attack to convince the State whose territorial sovereignty was violated to prevent the offender's unlawful activities from occurring. In such a situation, the State involved might have acted properly and might have sound reasons for its secret conduct. A State cannot act secretly and without public justification in its self defense, however, and expect nonetheless to have its actions condoned by the world community.

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[63]U.N. Sec. Council Res. 611 (April 25, 1988); statement before the U.N. Sec. Council (April 25, 1988).

V. CONCLUSION

State-sponsored terrorism has generated unprecedented dangers to the national security of democratic nations, which have in turn created the need to develop defensive actions, both military and prosecutorial. In our system of government, the law will govern the scope, and hence the effectiveness, of our response.

The stakes are high. Terrorists are now capable with the assistance of States of killing hundreds of innocents at a clip. We have made great strides in preventing terrorist crimes within the territorial United States, in other democracies, and in airports all over the world. But the technology for building bombs that can escape detection has outstripped the technology for preventing the tragedies they cause. We have reason to fear, moreover, that if this form of warfare continues it will get even bloodier. The bombs are getting smaller, more powerful, and more numerous. Other targets may be even more vulnerable than airplanes, and other methods of killing (such as chemical, bacterial, and even nuclear devices) may someday be used by terrorists because they are increasingly becoming available to their sponsors. We can count on no foreseeable political development to end this danger.

The battle to influence the law and to ensure that it serves the interests of freedom and the civilized world is therefore far from some abstract exercise. It is a struggle to determine whether the rule of law will prevail. It is baseless to contend that the United States no longer supports the rule of law merely because it is engaged in this struggle. We are not struggling against the rule of law, but for a rule of law that reflects our values and methods: the values of custom, tolerance, fairness, and equality; and the methods of reasoned, consistent, and principled analysis. We must oppose strenuously the adoption of rules of law that we cannot accept, because of the very fact that we take law so seriously.

We have no cause to doubt the propriety of this effort. The rules of law that we advocate enhance our capacity to defend our national security, but that hardly makes them inappropriate or unsound. Why should the law, for example, give its blessing to rules that:

- enable States to refuse to extradite individuals for committing internationally recognized crimes merely because the crimes were politically motivated?

- *limit a nation's right to defend itself to situations in which its territory or political independence is threatened, thereby preventing it from defending its citizens abroad?
- *enable terrorist groups to avoid responsibility for the criminal acts of their members, despite the universality of the rule of liability for criminal complicity?
- *enable States to avoid responsibility, in accordance with traditional, universally accepted standards, for providing sanctuary and support to groups known to be engaged in terrorist acts?
- *grant absolute and overriding weight in all situations to the interest of territorial integrity?

In the domestic arena as well, laws should not be written or applied needlessly to diminish our capacity to defend the national security. Our President is accountable to Congress, which has ample power to review and to exercise a high degree of control over the policies of any Administration. No need exists, however, for a War Powers Resolution that casts doubt upon the President's traditional and constitutionally-based authority to defend Americans and American interests from attack without prior legislative approval. The last four Presidents have made clear, moreover, that Executive officials must not murder anyone, anywhere in the world, for political purposes. No need exists to construe the assassination prohibition in a manner that inhibits the lawful exercise of lethal force.

Secretary Shultz said that the free nations "cannot afford to let the Orwellian corruption of language hamper our efforts to defend ourselves, our interests, or our friends."[64] The same is true of law. We must not allow the corruption of international law, such as the effort to legitimize "wars of national liberation" or to diminish the inherent right of self defense, to hamper our national security efforts. Rather, we must ensure that the law is, in fact, on our side,[65] and that, while its proper restraints are respected and effectively implemented, no artificial barrier is allowed to inhibit the legitimate exercise of power in dealing with the threat of state-sponsored terrorism.

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[64]Park Avenue Synagogue Address, *supra* note 7, at 14.

[65]"We seem to be forgetting that *the law is on our side*, that the very instruments of international law were drafted to defend democracy and to oppose terrorists and totalitarians." D. Moynihan, Terrorists, Totalitarians, and the Rule of Law in Terrorism: How the West Can Win 41, 42 (B. Netanyahu, ed. 1986) (emphasis in original).

THE CULTURE OF CHANGE IN MILITARY LAW

by Eugene R. Fidell*

I.

Anyone tracing the path of military law over the last several decades will be struck by two phenomena: the extent of change that has overtaken the system . . . and the resistance to change. Much of the change has been justified—or condemned— under the rubric of "civilianization"—the "C word," mere utterance of which still makes the occasional senior military lawyer see red. A substantial body of literature has been produced in the process.[1] But all too rarely have efforts been made to step back from the immediate issues of the day and consider the evolution of military justice in light of larger themes in the development of law and legal institutions. With the lowering of voices that has characterized the stewardship of Chief Judge Robinson O. Everett on the United States Court of Military Appeals (and with fingers crossed that the court will be spared yet another spell of personnel and doctrinal turbulence), attention can usefully be turned to those larger themes.

II.

The received learning is that military justice is *sui generis*, springing from essentially different jurisprudential sources from those out of which criminal and civil law have emerged. The Supreme Court has repeatedly sounded the theme that the military is of necessity a separate society, with a correspondingly separate set of rules.[2] Whatever its purposes and sources, the legislative basis of military law is also different from those of the other two bodies of American criminal law.[3] Where else, after all, is the process of elaborating a code of criminal procedure left so overwhelmingly to the prerogative

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[1] *E.g.*, Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3 (1970).

[2] *E.g.*, Schlesinger v. Councilman, 420 U.S. 738, 757 (1974); Parker v. Levy, 417 U.S. 733, 743 (1974).

[3] *See generally* Cook, *Courts-Martial: The Third System of American Criminal Law*, 1978 So. Ill. U.L. Rev. 1.

of the executive branch,[4] with so little actual involvement of the public, the bar, or Congress?[5]

This description is unlikely to change in the foreseeable future. There are, however, other perspectives from which the military and civilian legal systems may be considered. One of these—admittedly an elusive one—involves the process of change itself, and how those involved with the two systems view that process. On this level, the modern history of American military justice is essentially of a piece with the very *culture* of change in Anglo-American law over the last 150 years. This view is not at odds with the notion that military law serves different purposes, at least in part, from those served by general criminal law. It does, however, focus on an institutional dimension which, if examined, may foster greater mutual understanding between the military and civilian bars. Such an improvement in mutual understanding is desirable as a matter of public policy in a democratic society committed to civilian control of the military.

III.

Time and again since the early nineteenth century, major changes have shaken the basic doctrines, institutions, and mind-set of the law here and in England. Aspects of that history are instructive in thinking about the process of change in military law.

In 1848 the New York Legislature enacted the Field Code, abolishing the distinctions between law and equity and radically altering one of the most fundamental aspects of the common law system. Influential as it was, both in other states and in Britain, the Field Code was resisted by distinguished members of the bench and bar in both countries. Writing of law and equity, for example, Judge Samuel Seldon of New York wrote in *Reubens v. Joel*: "It is possible to abolish the one or the other, but it is certainly not possible to abolish the distinction between them."[6]

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[4]*See* Uniform Code of Military Justice art. 36, 10 U.S.C. § 836 (1982); Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[5]For several years the Defense Department has, as a matter of policy, 47 Fed. Reg. 3401 (1982); *see* 32 C.F.R. § 152.4(c) (1988), published notice of the availability of proposed MCM changes in the *Federal Register*, *e.g.*, 51 Fed. Reg. 4530, 31164 (1986), but very few members of the bar or of the public seek copies of the proposed changes or submit comments. Public and bar attendance at open meetings of the Code Committee is almost unheard of. *See generally* Fidell, *Military Justice: The Bar's Concern*, 67 A.B.A.J. 1280 (1981). For its part, Congress has never taken any interest in MCM changes and basically involves itself in military justice matters only in response to initiatives by the Defense Department.

[6]13 N.Y. 488, 493 (1856).

In his *History of American Law*, Professor Lawrence M. Friedman wrote:

> Certainly the [Field C]ode could not destroy the habits of a lifetime, nor, by itself, transform what may have been deeply imbedded in a particular legal culture. But the stubbornness of the judges was a short-run phenomenon, to the extent it occurred. The real vice of the code probably lay in its weak empirical base. The draftsmen derived their basic principles from ideas of right reason, rather than from a careful study of what actually happened in American courts, and what functions and interests courts and their lawsuits served.[7]

Friedman also noted the effort of Dean Henry Ingersoll of the University of Tennessee, in 1 *Yale Law Journal* (1891), to decry the "attempt of one State to adapt a Code of Procedure prepared for an entirely different social and business condition."[8] Addressing Ingersoll's criticism of the adoption of the Field Code by North Carolina during Reconstruction, Friedman commented: "Actually, systems of procedure did not fit particular cultures so snugly. Ingersoll's diatribe mostly meant that code pleading was more easily attacked when it could be identified with an alien, and in this case, a hated culture."[9]

To what extent is Dean Ingersoll's concern about the wholesale importation of concepts from one legal climate into another pertinent to the changes that have overtaken military law in our professional lifetimes? Respected observers have counseled caution in the adoption of civilian attitudes,[10] and whether or not one agrees on any particular reform, it is certainly advice that should be taken seriously. Arguably there is a parallel between the gap that separated the New York that enacted the Field Code and the North Carolina that copied it, on the one hand, and, on the other, the gap that separates civilian and military societies and defines their views of one another and of their respective legal systems. "Hatred" is certainly too strong a term for the relationship, but would "mutual mistrust" do? Anyone who has practiced in both communities would have to acknowledge the accuracy of such a description. Worse yet, there is little prospect for bridging this gap so long as our society is content to treat the military as a separate society. "Out of sight, out of mind" seems to

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[7]L. Friedman, History of American Law 394 (2d ed. 1985).
[8]Ingersoll, *Some Anomalies of Practice*, 1 Yale L.J. 89, 91 (1891).
[9]L. Friedman, *supra* note 7, at 396.
[10]*E.g.*, Gasch, *Who is Out of Step?*, The Army Lawyer, June 1978, at 1; E. Byrne, Military Law 12 (3d ed. 1981).

be the watchword. On the rare occasions when military justice is "in mind," the civilian mind—thanks in large measure to the mass media, which fixate on the perceived outrage of the moment—can conjure up little more than stereotypes.

IV.

Law reform was at least as controversial in England as it was in this country. For example, "[w]hen in the early nineteenth century the barrister Henry Brougham persisted in his proposals for law reform, solicitors threatened a professional boycott."[11]

One of the great judges (and pedants)[12] of the last century was Baron Parke, who served on the Court of King's Bench and Court of Exchequer for many years. In 1855, not long after New York passed the Field Code, Parke resigned. One view is that his resignation was age or health related (he suffered from gout).[13] Another—surprisingly, in light of his reputation as "a zealous laborer for the removal of all useless formalities in legal proceedings"[14]—is that the resignation was in reaction to passage of the Common Law Procedure Acts of 1854 and 1855.[15] Until federal judicial pay is raised, U.S. judges may quit the bench because their salaries are too low, but few leave the bench over matters of principle such as that which, on this view, stimulated Parke's departure.[16] Parke's view may seem hopelessly old-fashioned by today's standards,[17] but it shows how deep feelings can run.

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[11]D. Pannick, Judges 107 & n.8 (1987). The solicitors' threat seems not to have had much effect: Brougham wound up as Lord Chancellor. *See generally* A. Simpson, Biographical Dictionary of the Common Law 79-82 (1984).

[12]J. Baker, An Introduction to English Legal History 173 (2d ed. 1979) (quoting Lord Hanworth, Lord Chief Baron Pollock 198 (1929)).

[13]15 Dictionary of National Biography 226 (repr. 1921-22).

[14]E. Foss, A Biographical Dictionary of the Judges of England 497-98 (1870).

[15]15 Dictionary of National Biography, *supra* note 13, at 226; 15 W. Holdsworth, A History of English Law 487 (1965).

[16]*See* D. Pannick, *supra* note 11, at 15 & n.81. Parke did not leave the stage of English law when he left the bench—nor was he reviled for his protest. He was given a life peerage as Lord Wensleydale, but the House of Lords refused to seat him on the ground that the Crown's power to create life peers had lapsed through disuse. The Wensleydale Peerage, 10 Eng. Rep. 1181 (H.L. 1856). In time he was issued new letters patent for a hereditary peerage in tail male. *See generally* 14 Holdsworth, *supra* note 15, at 146-47; T. Plucknett, Taswell-Langmead's English Constitutional History 555-56 (11th ed. 1960). As he was quite an elderly man, and his sons had predeceased him, the effect was the same. *See generally* A. Simpson, *supra* note 11, at 402-04.

[17]*But see* Gabriel, *To Serve with Honor*, Army, May 1980, at 17 ("over the last 20 years the Canadian forces have had 27 flag officers publicly retire or resign in protest; the U.S. Army has had one"), *noted in* Stockdale, *What is Worth Resigning For*, Wash. Post, Sept. 21, 1980.

The cultural implications of the merger of law and equity—a development every lawyer now takes for granted—must not be discounted. For example, when, in 1875, England took a similar step in the Judicature Act, it was unprecedented that Lord Lindley, who had "taken silk" (i.e., become a Q.C., or Queen's Counsel) only three years earlier as a chancery practitioner, was promoted to the common law bench. Lindley's long career—he died in 1921, at the age of 94—highlights the last century's reshaping of the English legal system. While not a university graduate, he was a distinguished practitioner and highly-regarded judge, serving on the Common Pleas Division of the High Court, as a Lord Justice of the Court of Appeal, and as Master of the Rolls.

At his death Lindley was the last surviving English serjeant-at-law,[18] the group that had for centuries been the source of judicial appointees and enjoyed a monopoly over practice in the Court of Common Pleas. In 1846 the Common Pleas bar was expanded to non-serjeants,[19] and only twenty-two years later the last nonjudicial serjeants were created. One wonders how Lindley felt about the changes that overtook his profession during his lifetime, but it would not be surprising if he, like others,[20] thought of the earlier stages of his career as, in some sense, "the good old days."

Perhaps the same was true of Dr. T.H. Tristram, who died in 1912. He was the last Civil Law "advocate."[21] These lawyers, known as "civilians," had a separate status from the serjeants, who practiced

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[18]*See generally* J. Baher, The Order of Serjeants at Law (1984). There are those who count Serjeant Sullivan (1871-1959) as the last serjeant. He, however, was an Irish serjeant, although he practiced for many years in the English courts. *Compare* J. Baker, *supra* note 12, at 137 & n.7; A. Simpson, *supra* note 11, at 313, 497. A similar dispute rages over who was the last baron of the Court of Exchequer, as the last survivor (Pollock, B.) was not the last one to have been named to that court. That honor fell to Baron Huddleston. A. Simpson, *supra* note 11, at 420.

[19] 9 & 10 Vict., ch. 54 (1846); Opening of the Court to the Bar Generally, 136 Eng. Rep. 215 (C.P. 1846). The serjeants did not willingly relinquish their monopoly. In 1840 they had persuaded the Court of Common Pleas that a royal order allowing barristers to practice there was illegal. The court allowed those barristers who had taken Common Pleas cases to wind them up. *In re* Serjeants at Law, 133 Eng. Rep. 93 (C.P. 1840). The report of the proceedings observes that "[d]uring the delivery of the [judgment by Tindal, C.J.], a furious tempest of wind prevailed, which seemed to shake the fabric of Westminster Hall, and nearly burst open the windows and doors of the Court of Common Pleas." *Id.* at 94 n.*b.* It is perhaps not entirely coincidental that Parliament abolished the monopoly less than two months after Tindal died. *See* 136 Eng. Rep. 215 (C.P. 1846).

[20]*See* Sjt. Robinson, Bench and Bar: Reminiscences of One of the Last of an Ancient Race (1889).

[21]J. Baker, *supra* note 12, at 147.

in the higher common law courts. Until the nineteenth century they enjoyed a monopoly over matrimonial, divorce, probate, admiralty, and chivalry cases. "Military law was . . . from old time within the civilians' province."[22] In time, the willingness of Lord Mansfield to use Roman law, the law of nations, and opinions of foreign civilians "helped to level the barriers that had once separated the lawyers at Doctors' Commons [as their quarters were called] from the rest of the legal profession,"[23] but their last preserve—practice before the Court of Admiralty—remained closed to the ordinary bar until 1858.[24] Did Tristram and the other members of Doctors' Commons look upon the loss of that monopoly with equanimity, much less enthusiasm? Would it have been churlish of them to feel they had been unjustly ousted as custodians of these doctrinal areas?[25]

V.

The last 150 years have been a period of transformation, consolidation and—to a degree—homogenization of doctrinal areas that for a long while had been the peculiar preserve and responsibility of special segments of the civilian bar.[26] The evolution that has overtaken military law since 1950 is of a piece with that historic pattern. The Uniform Code of Military Justice itself reflected civilian doctrines; the idea of a real judiciary was added in 1968; and the Rubicon was irrevocably crossed in 1980 when the Military Rules of Evidence were promulgated. How many old-time military lawyers, schooled in the 1951 *Manual for Courts-Martial* or even the Articles of War, felt the way serjeants-at-law or Civil Law advocates once did as they watched the erosion of the doctrinal differences that had long set military law apart?

Unlike some of the other historical changes mentioned here, in military law there has been no formal bar monopoly to dismantle. Nonetheless, military lawyers, unlike the serjeants-at-law and the

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[22]W. Senior, Doctors' Commons and the Old Court of Admiralty: A Short History of the Civilians in England 102 (1922); *see also id.* at 11 (proceedings of military court of the Constable and Marshal).

[23]*Id.* at 107.

[24]*Id.* at 110.

[25]"It is said that [when Doctors' Commons wound up its affairs] the rooks, which some held to embody the spirits of departed civilians, forthwith forsook the trees in the [C]ollege [of Advocates] garden." *Id. Compare* note 19 *supra*.

[26]The process continues. At present, debate is raging in England over proposals by the Lord Chancellor that would, among other things, effectively abolish the distinctions between barristers and solicitors. *See* Lord Chancellor's Dep't, The Work and Organisation of the Legal Profession, CMD. 570 (1989), *noted in* N.Y. Times, Jan. 30, 1989, at A1, col. 1.

Civilian Advocates of English tradition, continue to bear unique responsibility for the development of military legal doctrine. There are relatively few trials or appeals in which civilian counsel play any role,[27] and the civilian bar has not been notably aggressive, independent, or effective in troubling itself with respect to military justice. Of course, the civilian judges of the Court of Military Appeals play a key role,[28] but through the courts of military review and, above all, custodianship of the *Manual for Courts-Martial* and ancillary service regulations, uniformed practitioners and judges are capable of exerting a far more pervasive influence.[29]

The question is, what will the military bench and bar do with that power? As a single—but far from trivial— illustration, will that bench and that bar continue to tolerate a clearly inferior and user-unfriendly military justice case digesting system simply to provide unneeded additional support for the largely undisputed proposition that the body of military jurisprudence remains different from others in key respects? More profoundly, how long will the military system be permitted to rely on trial and intermediate appellate benches the judges of which lack the minimal protection of fixed terms of office, however brief the duration? At a time when every other major system of justice in America has taken steps to institutionalize the process for systemic study and improvement in the administration of justice, why is there still nothing remotely approaching a National Institute of Military Justice that could draw on all of the law-related social sciences? Why are ideas like these[30] so slow in becoming a subject even of debate?

VI.

Now back to history. The lesson to be drawn from the progress of law reform since the nineteenth century is one of patience and toleration. We lawyers are a nostalgic lot. Symbolism and tradition count for much among us. As a result, it is important to take the longer

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[27]Cook, *supra* note 3, at 7-8.

[28]*See* Fidell & Greenhouse, *A Roving Commission: Specified Issues and the Function of the United States Court of Military Appeals*, 122 Mil. L. Rev. 117, 118-23 (1988).

[29]One perceptive observer suggested that this was one of the Court of Military Appeals' objectives in the mid-1970's. Cooke, *The United States Court of Military Appeals, 1975-77: Judicializing the Military Justice System*, 76 Mil. L. Rev. 43, 163 (1977) ("CMA is calling on the legal profession within the military to improve the military justice system and, ultimately, to run it.").

[30]*See also* Alley, *General and Special Courts-Martial as Tribunals of Continuing Existence: The Balance of Advantage*, in 13 Homer Ferguson Conference on Appellate Advocacy (1988).

view suggested by these historical analogies when addressing proposals for change and considering the resistance to change in military justice. The new should not be embraced merely because it is new. Nor should those who seek to preserve older approaches be derided as fuddy-duddies or worse for counseling caution or being loath to jettison institutions, modes of thought, and legal practices that they believe to be useful and legitimate and for which they view themselves as legatees and trustees.

Society ought to look to the custodians of military jurisprudence for professionalism. Professionalism, in a legal context, implies an unwillingness to accept circumstances simply because they exist, if there is room for improvement in either substance or appearance. Appearance—symbolism—is critical in any system of justice. It is even more critical when the system is one in which the bulk of criminal defendants—often members of disadvantaged minorities—find themselves toward the bottom of an official totem pole, and typically have little if any say in the selection of their legal representatives, either at trial or on appeal.

Professionalism also implies creativity and leadership (a good military concept) in shaping and testing new approaches while at the same time being *appropriately* respectful of tradition, values, and empirically demonstrable special demands of the jurisdiction. Military lawyers must explore the meaning, as applied to them, of their duty as "public citizen[s]" to "seek improvement of the law, the administration of justice, and the quality of service rendered by the legal profession."[31]

Military law is important to American society, and there is much that rightly sets it apart from the other sets of norms applied by the legal system. If a lawyer who uses his or her skills and energy to preserve the good and the practical in that system deserves praise, how much more so if those efforts are also informed by the lawyer's zeal for intelligent innovation where justified?

The old gospel song asks: "Will there be any stars in my crown when at evening the sun goeth down?" When the history of American military law is written, will there be any stars in *its* crown?

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[31]Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Preamble (31 Dec. 1987); American Bar Association, Model Rules of Professional Conduct, Preamble (1983). "As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients [and] employ that knowledge in reform of the law . . . . " *Id.*

ANDREW JACKSON, MARTIAL LAW, CIVILIAN CONTROL OF THE MILITARY, AND AMERICAN POLITICS: AN INTRIGUING AMALGAM

by Jonathan Lurie*

I.

The many contributions of Andrew Jackson toward our national greatness are so well known that there is no need to cite them here. His skills as a military leader, national politician, and presidential statesman remain suitable subjects for ongoing historical study.[1] Yet, in addition to his numerous and justifiable claims as one of our greatest presidents, Andrew Jackson has two other distinctions unique to him. He is the only president to survive an assassination attempt when two pistols were discharged at point blank range with both charges misfiring.[2] More important for our purposes, Jackson is the only president who before assuming that office had been found in contempt of court by a federal judge and fined $1,000, a considerable sum in 1815.

Jackson's career could be described as a classic example of the American civilian-military synthesis: the planter/civilian who in times of crisis became a military leader—only to return to civilian life after the crisis was resolved. No American president before or since Jackson has personified this synthesis with such popularity.[3] Thus examination of the episode that ultimately involved Jackson as a supreme military commander, a defendant before a federal court, and finally as a venerated elder statesman in retirement is valuable

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[1]See, for example, the monumental three volume study by Robert Remini, with particular emphasis on the sources listed in the third volume. The first volume, *Andrew Jackson and the Course of American Empire, 1767-1821* (1977) [hereinafter 1 R. Remini], has been very important for preparation of the first part of this paper.

[2]John William Ward states that "an expert on small arms calculated the odds on two successive misfires of this nature to be about 125,000 to 1." J. Ward, Andrew Jackson: Symbol for an Age 114 (1955).

[3]Although published more than thirty years ago, the study by Ward remains one of the best analyses of this theme.

for several reasons. It reflects the peculiar American ambivalence toward military necessity and civilian control in the context of American politics. It reveals the ongoing tension between these two forces. Indeed, its ultimate outcome should remind us that in the American experience, civilian control of the military cannot be separated from the political process, a fact that tends to make such control less effective.

II.

Jackson arrived in New Orleans on December 1, 1814. By the middle of the month he found it necessary to place the city under martial law, a step that may well have been urged upon him by some legislative leaders.[4] Jackson made it clear from the start that his primary aim was to defeat the British army, rather than merely to defend the city. When a delegation of the Louisiana Legislature, fearful for their safety and property, asked him what he would do if a retreat became necessary, Jackson was characteristically candid. "Say to your honorable body, that if disaster does overtake me, and the fate of war drives me from my line to the city, they may expect to have a very warm session."[5] From his arrival to his ultimate triumphant departure, Jackson's relations with the civilian leadership of New Orleans and that of the State legislature in session there were far from smooth. New Orleans, already established as one of the most cosmopolitan of American cities, had difficulty accepting the martial law requirements that "every citizen entering the city must report to the adjutant general's office . . . [and] that no person might leave without permission in writing signed by the General or one of his staff." A 9:00 p.m. curfew was in effect, and "[a]ny unauthorized person found in the streets after that hour would be arrested [and presumably treated] as a spy."[6]

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[4]In retrospect, Jackson acknowledged that absent martial law, the extent of his authority "was far short of that which necessity and my situation required." Thus he determined, again in his words, "to venture boldly forth and pursue a course correspondent to the difficulties that pressed upon me." If, he concluded, "disaster did come, I expected not to survive it; but if a successful defense could be made, I felt assured that my country, in the objects attained, would lose sight of and forget the means that had been employed." 1 A. Colyar, Life and Times of Andrew Jackson 254 (1904).

[5]1 R. Remini, *supra* note 1, at 268. Looking back at the episode many years later, Jackson was even more graphic. "I should have retreated to the city, fired it, and fought the enemy amidst the surrounding flames. . . . I would have destroyed New Orleans, occupied a position above on the river, cut off all supplies, and in this way compelled them to depart from the country." *Id.*

[6]*Id.* at 256.

Details of Jackson's incredible victory over a much larger British force need not be rehashed here. He became more than a hero to New Orleans; by January 23, 1815, he was regarded as the city's—to say nothing of the nation's—savior. And indeed, even after making due allowance for 19th century hyperbole, contemporary descriptions of the emotion and excitement generated by his triumphant reception remain impressive.[7] Yet, for Jackson the day of celebration had not ended the war nor the necessity for martial law. Rumors of a peace treaty were prevalent but thus far had proven only to be rumors. The British might well return at any moment. Until he received *official* word that a treaty had been signed, Jackson insisted that the city maintain the status quo ante—the continued state of martial law.[8]

During the next two months, tensions between Jackson and the leadership of New Orleans were exacerbated, to put it mildly.[9] Indeed, he informed Governor Claiborne that if either he or the legislature "attempt to interfere with subjects not belonging to you, [they] will be immediately arrested."[10] Outwardly oblivious to the widespread demands for an end to martial law, he refused to release the militia. He even went so far as to order the deportation of numerous French speaking residents. This was the setting for Jackson's ultimate confrontation with federal civil authority.

III.

Shortly after Jackson's order of deportation, the local French language newspaper printed an editorial supposedly written by a "citizen of Louisiana of French Origin." Although indebted to Jackson for preserving New Orleans, the author wrote, "we do not feel much inclined, through gratitude, to sacrifice any of our privileges, and, less than any other, that of expressing our opinion of the acts of his administration." Moreover, "citizens accused of any crime should be rendered to their natural judges." With the British in open retreat, Jackson's continued authoritarianism was now neither ap-

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[7] *See, e.g., id.* at 290-92.

[8] "How disgraceful," wrote Jackson on February 21, 1815, while ordering retraction by a local newspaper of a report concerning a peace treaty in the absence of official notification to the commanding general, "as well as disastrous would it be, if by surrendering ourselves credulously and weakly to newspaper publications, often proceeding from ignorance but more frequently from dishonest design—we permitted an enemy whom we have so lately and so gloriously beaten to regain the advantages he has lost, and triumph over us in turn!!" 2 Correspondence of Andrew Jackson 179 (J. Basset, ed. 1927) [hereinafter Correspondence].

[9] *Id.* at 308-09.

[10] *Id.* at 308.

propriate nor acceptable.[11] The general's response to the editorial was both rigorous and rapid—two characteristics, it might be noted, traditionally associated with "military justice."

The editor of the newspaper was brought before Jackson and forced (upon what penalty is not clear) to identify the author of the offending editorial. He identified the writer as one Louis Louailler, who in addition to his proclivity with the pen, was also a duly elected member of the Louisiana legislature. Jackson ordered Louailler's arrest both for inciting a mutiny and for spying. This individual was picked up a couple of days later by a unit of troops, and he apparently yelled to some observers that he was being kidnapped by armed men. A lawyer in the crowd came forward, offered his services, and rushed to the home of Federal Judge Dominick A. Hall. The judge promptly issued a writ of habeas corpus, returnable in open court the next morning. Jackson just as promptly ordered the arrest of the judge for "aiding, abetting and exciting mutiny within my camp." The next day found Louailler not before Judge Hall but rather locked in the same barracks with him, presumably not what the judge had envisaged in issuing the writ in the first place.[12]

Jackson's next step was to convene a court-martial to try Louailler. But the defendant challenged the authority of the court to try him at all, arguing that in fact he was neither a member of the army nor the militia. As for the charge of spying, what spy would trouble to make his views known in the local newspaper? The court dismissed the charges; Jackson then dismissed the court and commanded that Louailler be returned to prison.[13] At the same time, he may have

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[11]B. Davis, Old Hickory: A Life of Andrew Jackson 155 (1977); 1 R. Remini, *supra* note 1, at 310.

[12]B. Davis, *supra* note 11, at 155.

[13]This blatant example of what is now commonly called "command influence" is not the only instance where Jackson disregarded the verdict of the military court, something that under existing rules of war he had every right to do. In 1818, while in Florida for military action against the Seminoles, Jackson ordered the arrest and court-martial of two British subjects, Arbuthnot and Ambrister. According to Remini, Jackson believed that speedy trials and even speedier executions were warranted. 1 R. Remini, *supra* note 1, at 357. The entire procedure from court-martial to consummation of sentence took two days. The court ordered Arbuthnot to be hung and Ambrister to be shot; but at the request of at least one member of the court, reconsideration took place concerning Ambrister's fate, and ultimately the officers voted "for fifty lashes on the bare back and confinement with ball and chain to hard labor for one year." Jackson disregarded the recommendation and ordered both executions in the manner originally voted. These "unprincipled villains," wrote Jackson to John Calhoun, Secretary of War, "were legally convicted . . . legally condemned, and most justly executed for their iniquities." Their case, he continued, presented scenes of "wickedness, corruption, and barbarity at which the heart sickens." *Id.* at 358-59; 2 Correspondence, *supra* note 8.

realized the impossibility of convicting Hall, for Jackson never convened another court-martial to try the case. Instead, he ordered Hall to be moved out of New Orleans "beyond the limits of my encampment to prevent you from a repetition of the improper conduct for which you have been arrested and confined."[14] One day later, on March 13, 1815, Jackson received official word of the peace treaty, and he immediately revoked martial law. Louailler was freed, and Hall was permitted to return to the city. Hall's response was not long in coming. But for the moment, as had also been the case immediately after his initial military triumph in New Orleans, Jackson was once again the city's hero; he had won the war and now heralded the peace.

Jackson paid glowing tribute to the soldiers now finally released from service. They had "secured to America a proud name . . . [and] a glory which will never perish." His expression of thanks might be feeble, he said, "but the gratitude of a country of freemen is yours; yours the applause of an admiring world."[15] In responding to laudatory remarks proffered by another group of soldiers, Jackson referred to the "unpleasantness" under the lengthy imposition of martial law. It is clear that he realized the strong opposition that his measures had provoked.

When "invaluable" constitutional rights were threatened by invasion, certain basic privileges "may be required to be infringed for their security. At such a crisis, we have only to determine whether we will suspend, for a time, the exercise of the latter, that we may secure the permanent enjoyment of the former." Is it wise, he asked, to sacrifice "the spirit of the laws to the letter" and thus "lose the substance forever, in order that we may, for an instant, preserve the shadow?" Laws, Jackson concluded, "must sometimes be silent when necessity speaks." Professor Remini correctly described this argument as one "that can justify monstrous misdeeds as well as noble acts of patriotism.[16]

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[14]B. Davis, *supra* note 11, at 189.

[15]*Id.* at 155.

[16]1 R. Remini, *supra* note 1, at 313. It might be noted that in the famous *Merryman* Case of 1861, Chief Justice Roger Taney denounced the suspension of habeas corpus by President Lincoln. In justification of his action to Congress, Lincoln sounded very much like Jackson. In the midst of the secession crisis, he asked, "are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" 4 A. Lincoln, Collected Works 430 (Roy Basler, ed). It might further be noted that Judge Hall fared very well at the hands of Jackson when compared to a member of the Maryland judiciary during the Civil War. Circuit Judge Richard Carmichael "was arrested while conducting court at Easton, and when he refused to submit, was clubbed over the head with a revolver and dragged off the bench." W. Lewis, Without Fear or Favor 452 (1965).

On March 21, 1815, Judge Hall issued a show cause order for Jackson to appear before him, to explain why he should not be held in contempt of court for the Louailler incident. There is little reason to doubt that Hall was determined to punish Jackson for the outrage perpetrated on this federal judge, as much if not more than for the treatment meted out to the unfortunate columnist-legislator. It also seems clear that in making himself judge, prosecutor, and jury in a matter involving himself, Hall came perilously close to judicial impropriety if not indiscretion. In response to the writ, Jackson appeared before the judge on March 24, accompanied by two attorneys and an admiring crowd of sympathetic spectators.[17]

Jackson's counsel immediately raised almost a dozen legal objections to the entire proceeding. They ranged from the claim that witnesses against Jackson had been summoned, yet no actual suit had been commenced, to the point that Hall's summons was unconstitutional under the seventh and eighth amendments to the Constitution. Jackson's attorneys also asserted that because Hall had not been in court when he issued the original writ on behalf of Louailler, none of the alleged contempts "were offered in any cause or hearing *before* the said District Court." Further, the attorneys claimed that Jackson's response to the writ might well require investigation of Hall's actions while martial law was in effect, and that this was therefore clearly a proceeding over which Hall could not preside "without violating one of the first and clearest maxims of all law."[18] Not surprisingly, Hall rejected all these challenges, and Jackson then sought to read a lengthy justification and explanation of his actions, beginning prior to his proclamation of martial law.

At this point Hall temporized. He laid down four conditions under which he would listen to Jackson's explanation:

a) If the party demur to the jurisdiction, the Court will hear.

b) If the party's affidavit deny the facts sworn to, or if he wish to show that the facts as charged do not amount to a contempt, the Court will hear.

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[17]According to Remini, one of this number sidled up to Jackson and whispered: "General, say the word and we pitch the judge and the bloody courthouse in the river." Jackson declined the offer, and turning to Judge Hall, who apparently observed this scene with some consternation, intoned, "There is no danger here .... [T]he same arm that protected from outrage this city ... will shield and protect this court, or perish in the effort." 1 R. Remini, *supra* note 1, at 314.

[18]*Andrew Jackson and Judge D.A. Hall*, 5 Louisiana Historical Quarterly 551-53 (1922). All citations relating to *United States v. Jackson*, except where otherwise noted, are taken from this apparently complete compilation of the official documents.

> c) If the party be desirous to show that, by the Constitution and laws of the United States, or in [sic] virtue of his military commission, he had a right to act as charged . . . , the Court will hear.
>
> d) If the answer contain anything as an apology to this Court, it will hear.[19]

Jackson appears to have made no direct response to these four conditions. His attorney, however, was permitted to begin reading the explanatory statement. It is not known how far he got into the actual text. Hall, convinced at some point that the argument was essentially one for military necessity alone as the justification for Jackson's conduct, refused to hear the complete statement.[20] The case apparently was delayed for one week.[21]

It is clear that in the interval, Jackson sought legal advice concerning the constitutionality of his martial law proclamation. Two memoranda, both dated March 27, 1815, may be found in his published papers: one by his counsel Edward Livingston; and the other by Abner Duncan, a local attorney who apparently assisted Jackson in this litigation. Livingston informed Jackson that such a proclamation "is unknown either to the Constitution or Laws of the U.S., [and] that it is to be justified only by the necissity [sic] of the Case and

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[19]2 A. Buell, History of Andrew Jackson 89-90 (1904). Hall was certainly well aware of the claim that he was serving as judge of his own cause. He candidly admitted that one, if not *the*, justification for the contempt proceedings "is the imprisonment of the Judge, and the consequent obstruction of the cause of justice." The offense, and not so much the judge against whom it was committed remained the important issue. "No personal considerations ought for an instant to induce a Judge to abandon the defence of the laws, the support of the dignity of the tribunals, and the rights of his fellow-citizens." *Andrew Jackson and Judge D.A. Hall, supra* note 18, at 546.

[20]Had he heard the entire explanation, it is doubtful if Hall would have been satisfied. Jackson insisted that "personal liberty cannot exist at a time when every man is required to become a soldier." Not even private property could be "secured when its use is indispensable for the public safety." Moreover, "unlimited liberty of speech is incompatible with the discipline of a camp." Concerning the alleged unconstitutionality of his action, Jackson reminded the judge that the instant proceeding was a criminal prosecution for contempt, yet the Constitution "declares that in all criminal prosecutions the accused shall have the benefit of a trial by jury." Why was this not the case here? Because "courts could not, it is said, subsist without a power to punish promptly, by their own act, and not by the intervention of a jury." Refusing to let his point pass by implication, Jackson spelled it out. "Necessity then, may in some cases, justify the breach of the Constitution; and if, in the doubtful case of avoiding confusion in a court, shall it be denied in the serious one of preserving a country from conquest and ruin?" As for an apology to the court, the powers Jackson exercised "have saved the country; and whatever may be the opinion of that country, or the decrees of its courts, in relations to the means he has used, he can never regret that he employed them." *Andrew Jackson and Judge D.A. Hall, supra* note 18, at 560-61, 566-67.

[21]1 R. Remini, *supra* note 1, at 314.

that therefore the General proclaims it at his risque [sic] and under his responsibility. . . . Where the necessety [sic] is apparent he will meet reward instead of punishment. . . ." Duncan advised that unless specifically exempted from the proclamation, men who might otherwise be in the legislative or judicial branches of government "must become soldiers and as such cannot at the same time exercise their civil options." Presumably this meant that Hall had no legal authority to issue a writ of habeas corpus while Jackson's state of martial law was still in effect. Reiterating the point that the Constitution provided for suspension of the writ of habeas corpus when in case of invasion the public safety may require it, Duncan insisted that it was up to the commanding officer, "to him who is to conduct the operations against the enemy, whose vigilance is to descry danger and whose arms are to repel it" to judge such cases.[22]

When the case came up again on March 31st, the government attorney attributed Jackson's "arbitrary proceedings" not to "his conviction of their necessity," but rather to "the indulged infirmity of an obstinate and morbidly irascible temperament, and to the unyielding pride of a man naturally impatient of the least show of opposition to his will."[23] Again, Hall refused to hear Jackson's defense. Instead he asked the general to respond to nineteen specific interrogatories. This time it was Jackson's turn to refuse. He would not answer because the court "would not hear my defense." Thus, Jackson would accept the sentence of the court "with nothing further to add." On the other hand, "as no opportunity has been furnished me to explain the reasons and motives which influenced my conduct, so it is expected that censure will form no part of that punishment which your Honor may imagine it your duty to perform."[24]

Hall responded with an equally dignified statement. Jackson's service to the country was obvious; a jail term was inappropriate. But for this judge, described by one contemporary as "a magistrate of pure heart, clean hands, and a mind susceptible of no fear but that of God," the only question was "whether the Law should bend to

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[22]2 Correspondence, *supra* note 8, at 197-99.

[23]B. Davis, *supra* note 11, at 156.

[24]1 R. Remini, *supra* note 1, at 314. Jackson's decision to refuse response to the interrogatories apparently had been determined before the court reconvened. Two drafts of his statement to Judge Hall have survived. It is interesting, and possibly typical of Jackson's character, that the draft *not* used contained the nearest thing to a "Jacksonian apology." "I may have erred, but my motives cannot be misinterpreted. . . . The law can be satisfied without wounding my feelings . . . . " J. Bassett, The Life of Andrew Jackson 224 (1931).

the General or the General to the law." For Hall, the answer was never in doubt. He found Jackson in contempt and fined him $1000, a sum which the defendant promptly paid. Moreover, the general gave a short discourse on civic obedience to the crowd that escorted him from the courthouse. "Considering obedience to the laws, even when we think them unjustly applied, as the first duty of the citizen, I did not hesitate to comply with the sentence you have heard, and I entreat you to remember the example I have given you of respectful submission to the administration of justice."[25]

Why did Jackson pay the fine? Remini noted that for the rest of his life, Jackson believed that he had been justified in his action against Judge Hall. It was not in character for him to give in on what he considered an important matter of principle. Remini added that the controversy had gone on much too long, and had become one that Jackson could not win.[26] On the other hand, the rhetoric of his remarks at the end of the trial can be interpreted to indicate an awareness that he was not altogether blameless. After all, it was Jackson who had declined to "render obedience to the laws," upon Hall's issuance of a writ.

Even the Federal Government in Washington took note of the Jackson-Hall controversy. On April 12, Secretary of War Dallas informed Jackson that reports of his action "require immediate attention, not only in vindication of the just authority of the laws, but to rescue your own conduct from all unmerited reproach." It would appear, wrote the Secretary, that "the Judicial power of the United States has been resisted, the liberty of the press has been suspended," and subjects of a friendly government "have been exposed to great inconvenience." At which point Dallas offered a good example of the "kid gloves" treatment that Madison and his cabinet tended to display towards the most popular American military hero of his time.

> The President views the subject, in its present aspect, with surprize [sic] and solicitude; but in the absence of all information from yourself, relative to your conduct and the motives for your conduct, he abstains from any decision, or even the expression of an Opinion, upon the case, in hopes that such explanations may be afforded, as will reconcile his sense of public duty with

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[25] 1 R. Remini, *supra* note 1, at 314-15; J. Bassett, *supra* note 24, at 227.

[26] 1 R. Remini, *supra* note 1, at 315. As will be shown, this was one controversy that ultimately Jackson did indeed win.

> a continuance of the confidence, which he reposes in your Judgement, discretion, and patriotism.

In the meantime, Dallas continued, "it is presumed that every extraordinary exertion of military authority has ceased." Finally, President Madison "instructs me to take this oppertunity [sic] of requesting that a conciliatory deportment may be observed towards the State authorities and the citizens of New Orleans."[27]

Jackson promptly sent the text of the explanation he had sought to offer the court, along with a vigorous denunciation of those who criticized his conduct. But neither Madison nor his cabinet had any desire to make more of the incident, and upon reflection, Jackson also decided to let the matter rest. Indeed, during an emotional visit to New Orleans in 1816, Jackson and Hall met again. Jackson's own account of the visit is too good to summarize.

> When he offered me his hand, I received it and in the gratification of my friends on this occasion my mind receives its reward and tells me I have done right. I have in some measure added peace to his bosom, tranquility to my own[,] and restored him to the social circle of his former friends .... On my part the hatchet is buried in oblivion ....[28]

IV.

Had Jackson retired from the military and resumed his career as a "southern gentleman," his statement might have been accurate. But Jackson went on to provoke further military controversy concerning his conduct in Florida, almost won the presidency in 1824, and did indeed win it in 1828 with a triumphant reelection four years later. Occasionally, the New Orleans incident was raised in the course of partisan, political debate to which Jackson's career lent itself so well. Externally, the incident was "buried in oblivion." Internally, it continued to rankle within Jackson's memory. But not until 1842, with the former president retired, in failing health, and in serious financial difficulties, was the stage set for the final resolution of Andrew Jackson v. Dominick Hall.

In June of that year, congressional supporters of Jackson introduced a bill to remit the fine levied in 1815 plus accrued interest. They tried to frame their proposal as a simple refund of a fine, without

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[27] 2 Correspondence, *supra* note 8, at 203-04.
[28] *Id.* at 259.

getting into the very controversial question of whether either Jackson or Hall had been justified in their conduct. The proposal immediately fell victim to partisan wrangling between the Whigs and the Democrats. The Whigs wanted to make it clear that only charitable motives justified the measure, and they wanted assurance that no censure of Judge Hall was intended. When they amended the bill to include such a disclaimer, Jackson sputtered with rage. "The Whiggs [sic]," he wrote, "odiously amended the Bill from an act of shear [sic] justice to one of special grace, which . . . the Whiggs knew I would spurn with indignation, and heartfelt contempt of the movers in this insulting action to me."[29] With his strong encouragement, Democrats killed the entire proposal.

In December 1842 they tried again. During his annual message to Congress, President John Tyler urged that the fine be refunded. He explicitly refused to impute "any reflection on the judicial tribunal which imposed the fine." As the President put it, "the voice of the civil authority was heard amidst the glitter of arms, and obeyed by those who held the sword." Tyler further noted that "if the laws were offended, their majesty was fully vindicated." Concluding that a refund would be "gratifying to the war-worn veteran, now in retirement and in the winter of his days," he stated: "[I]f the civil law be violated from praiseworthy motives, or an overruling sense of public danger and public necessity, punishment may well be restrained within that limit which asserts and maintains the . . . subjection of the military to the civil power."[30] One speaker supported the refund "not because General Jackson ought to have it—not because the imprisonment of Judge Hall was right—but because he believed the motives of General Jackson to be pure."[31] Again, the Senate sponsor of the bill emphasized that the constitutionality of either Jackson's or Hall's conduct was not the issue. Those favoring remission of the fine "never said aught about the Judge being right or wrong."[32]

The Whigs, typified by John Quincy Adams, whose admiration for his successor was less than excessive, persisted in their efforts to make political capital out of the inevitable. Adams urged the Congress not to set a precedent "of pensioning an ex President." If

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[29]6 Correspondence, *supra* note 8, at 155. Jackson insisted that it was "on the basis of justice alone" that his claim rested. Under no conditions could he "receive money from my Government as a substitute for its justice." It was Hall "that refused to hear my defence thus depriving me of a constitutional right." *Id.* at 157.

[30]14 Abridgment of the Debates of Congress 609 [hereinafter Debates].

[31]*Id.* at 636.

[32]12 Cong. Globe, 27th Cong., 3rd Sess., Appendix at 68.

Jackson was in serious financial straits, Adams would "make up a subscription among the members of Congress to make a present to the old man in his last days."[33] Another Whig urged that the matter of Jackson's constitutional authority for what he had done be resolved before voting to refund the fine.[34] The resultant bickering prevented any action on Tyler's request during 1843.

Finally, in February 1844, Congress passed the refund measure by decisive votes: 30 to 16 in the Senate; and 158 to 28 in the House.[35] From the Hermitage, the old general was quick to comment on the favorable outcome. "I feel truly gratified at the vote of the House . . . reversing the fine imposed by that vindictive and corrupt Judge Hall."[36] President Tyler wrote to offer congratulations "at this act of justice," and to assure Jackson that "nothing is now left . . . to sully, in any degree, the glory of the memorable defense of [New Orleans.]"[37] All that remained was for Jackson to receive a check from the Treasurer of the United States for $2,732.90. The check was delivered on February 27th, thus bringing the ultimate end to an incident unique in our history.

From Jackson's point of view, the episode had a fitting and satisfying conclusion. From the viewpoint of a legal historian, it is not at all clear exactly what was settled. In the first place, the real issue—was Jackson justified in detaining Judge Hall and disobeying the writ—was never resolved. To be sure, Judge Hall himself must bear much responsibility for this fact, because he refused to hear Jackson's explanation. This action was hard to justify, especially because hearing the defense would in no way have dictated his future course of action. Secondly, the ultimate resolution—remitting the fine, with no mention of justification or assessment of responsibility—was a political solution wrapped up in Jacksonian politics. Moreover, the fact that there was such overwhelming sentiment to return the fine

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[33]Recalling what had happened the previous June, it is hard to avoid the conclusion that Adams proposed such a step knowing full well that Jackson's pride would lead him to reject out of hand a proffer of charity or anything that even remotely smacked of it. Indeed, the Whigs temporarily succeeded in changing the title of the proposed law from "a bill to indemnify" Jackson to "a bill for the relief" of Jackson, as well as inserting, again, a provision that no censure of either Jackson or Hall was implied by the proposed legislation. Debates, *supra* note 30, at 638, 639, 641.

[34]*Id.* at 627-28. The speaker, Senator R. Bayard from Delaware, carefully refrained from claiming that Jackson's action was in fact unconstitutional, taking instead the much more prudent political course of merely asking that the question be addressed.

[35]Actually, the House vote came on January 8, 1844, with the Senate concurring on February 11th.

[36]6 Correspondence, *supra* note 8, at 258.

[37]*Id.* at 260.

plus interest indicates that Jackson's generation was little troubled by the issue of civilian/judicial control over the military.

Yet the nagging question raised by this incident continued to trouble our legal history. Whether or not a definitive answer could have served as a guide for future incidents can never be known. The actual record shows pragmatic rather than doctrinal responses that on the whole are not encouraging to those favoring a total and absolute civilian control over the military.

Our generation is much more sensitive to this aspect of our political structure than was Jackson's; but the historical record remains ambiguous at best. Even the great constitutional principles so boldly announced in *Ex Parte Milligan* were contained in a decision delayed until well after the Civil War had ended—when the opinion could do no harm to the military. From Jackson's era to our own, judges have tried to avoid confrontations with the military, resulting during World War II, for example, in some decisions that cannot be reconciled with American standards of due process. A recent cartoon in the *New Yorker* shows a lady serving as the "foreperson" of a jury. She announces as the verdict of her peers that "we find the guilty defendant not guilty." Perhaps this statement may serve as a fitting conclusion to the unusual case of *United States v. Andrew Jackson.*

INSTRUCTIONS AND ADVOCACY*

by Major Michael D. Warren** and
Lieutenant Colonel W. Gary Jewell***

TABLE OF CONTENTS

		Page
I.	Introduction	148
II.	Sources of Instructions	149
III.	Pretrial Preparation	150
IV.	Preliminary Instructions	153
	A. The Absent Accused	155
	B. Mixed Plea Cases	156
V.	Instructions on Findings	160
	A. Tailoring	160
	B. Elements of the Offenses	163
	C. Lesser Included Offenses	165
	D. Defenses	167
	E. Evidentiary Instructions	171
	1. Accomplice Testimony	171
	2. Uncharged Misconduct	172
	3. Accused's Failure to Testify	174
VI.	Delivery of Instructions	175
VII.	Instructions on Sentencing	177
	A. Punishments	178
	1. Multiplicity	178
	2. Punishments Other Than the Maximum	179
	3. Discharges and Benefits Lost	181
	4. Equivalent Punishments	183
	B. Extenuation, Mitigation, & Aggravation	184
	1. Tailoring	184
	2. Effect of a Guilty Plea	184
	3. Pretrial Restraint	185
	4. Mendacious Accused	186
VIII.	Argument	186
IX.	Waiver	187
X.	Conclusion	187

I. INTRODUCTION

Counsel often treat instructions as an area solely within the province of the military judge. Slip opinions with instructional issues are typically skimmed so that more time can be devoted to opinions dealing with more interesting evidentiary and constitutional issues. This is unfortunate and ill advised. What the military judge says to the members of the court during instructions has a profound impact on them and the case. The charge to the court can either reinforce counsel's theory of the case or neutralize all prior efforts. For proof of this proposition counsel need to look no further than the newspaper reports of Lieutenant Colonel Oliver North's trial and Judge Gerhard Gessel's refusal to give the instruction on the defense of superior orders. Counsel must be aware of the law concerning instructions and must consider instructions just as integral a part of their trial preparation as their opening statement, direct and cross-examination, and their closing argument. This article will examine the area of instructions from the perspective of the courtroom advocate.

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II. SOURCES OF INSTRUCTIONS

The primary source of instructions for the military judge, and therefore counsel, is the *Military Judges' Benchbook*.[1] Further guidance on when and what the military judge instructs is also contained in the Manual for Courts-Martial,[2] in the Military Rules of Evidence,[3] and in case law. Some cases include examples of defective instructions as well as model instructions. For example, in *United States v. McClaurin*[4] the United States Court of Military Appeals set out a model instruction on inter-racial identification that the court approved in cases where such identification is a primary issue.[5]

While most instructions given the members in a court-martial are contained in the *Benchbook*, counsel may request that those instructions be modified in a particular case or may propose new instructions to the military judge.[6] The *Benchbook* is only a *guide* and is designed to be supplemented or modified as necessary to conform to the facts and circumstances of each particular case.[7]

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[1]Dep't of Army, Pam. 27-9, Military Judges' Benchbook (1 May 1982) [hereinafter Benchbook].

[2]Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984] Rule for Courts-Martial (R.C.M.) 920(a) discussion states: "Instructions consist of a statement of the issues in the case and an explanation of the legal standards and procedural requirements by which the members will determine findings." R.C.M. 920 also sets out the required instructions to be given by the military judge on findings. R.C.M. 1005 sets forth the mandatory instructions on sentencing.

[3]MCM, 1984, Military Rules of Evidence [hereinafter Mil. R. Evid.].

[4]22 M.J. 310 (C.M.A. 1986). *See* Benchbook, para. 7-7.1 (C3, 15 Feb. 1989) (includes instruction on inter-racial identification based on *McClaurin*).

[5]Benchbook, para. 7-7.1 n.2 (C3, 15 Feb. 1989), citing a model instruction suggested by Chief Judge Bazelon in a concurring opinion in United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972). Counsel may wish to consult federal or state sample jury instructions for article 134 offenses in violation of federal law, including state offenses applicable through the Federal Assimilative Crimes Act. *See, e.g.*, E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (1970 & 1987) (contains sample instructions on interstate shipment and transportation offenses, counterfeiting, and racketeering). Sample instructions are also available from many states, *see, e.g.*, E. Abbott & E. Solomon, Instructions For Virginia and West Virginia (1962 & Supp. 1986); Ridley, Requests To Charge (1985) (Georgia).

[6]United States v. Rowe, 11 M.J. 11 (C.M.A. 1981).

[7]The U.S. Army Trial Judiciary is the proponent for the Benchbook and periodically updates and changes the Benchbook to properly reflect the current state of the law in the form instructions. There are also a number of jury instruction form books with sample instructions. While most of these resources are not directly applicable to courts-martial practice, they provide a starting point on unique issues. *See, e.g.*, ABA Antitrust Section, Jury Instructions in Criminal Antitrust Cases 1964-1976 (1978) (sample instruction where case involved prior publicity and where witness consulted with counsel at trial).

III. PRETRIAL PREPARATION

When beginning preparation of a case, counsel should start with a review of the applicable instructions in the *Benchbook*. In preparing for trial, every trial notebook should contain a copy of the "Checklist for Drafting Final Instructions" located at Appendix A of the *Benchbook*. Counsel must review these instructions to determine which should be given sua sponte by the military judge, what additional instructions should be requested, and how the instructions can best be tailored to the case. Reviewing the instructions thus permits counsel to object intelligently or to argue for further instructions at the R.C.M. 802 conference[8] or the article 39a session in which the military judge covers the proposed instructions. During pretrial planning counsel should think in terms of instructions that limit the use and weight of unfavorable evidence; state burdens on issues favorably; and explain the key terms, theories, and legal principles on which the case is based.[9] Counsel must seek every advantage for their client throughout the course of the trial.[10] By challenging proposed instructions or submitting new instructions, counsel also have an opportunity to "make law."

If counsel contemplate requesting a new or modified instruction from the military judge, then counsel must first know the appropriate standard the military judge will apply when offered the proposed instruction. In deciding whether to give the instruction requested by counsel, the military judge will apply a three part test:

1) Is the issue reasonably raised?

2) Is the requested instruction adequately covered elsewhere in the instructions? and;

3) Does the proposed instruction accurately state the law concerning the facts in the present case?[11]

The military judge has substantial discretion in this area, and many judges may be reluctant to vary from the standard instructions contained in the *Benchbook*. Thus counsel must be prepared to explain

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[8]MCM, 1984, Rules for Courts-Martial 802(a) [hereinafter R.C.M.] states: "In general. After referral, the military judge may, upon request of any party or sua sponte, order one or more conferences with the parties to consider such matters as will promote a fair and expeditious trial."

[9]A. Amsterdam, Trial Manual 3 for the Defense of Criminal Cases, 1-431 (1978). In deciding what instructional issues should be addressed, counsel generally should limit their efforts to "focus squarely on the defense theory." *Id.* at 1-432.

[10]*Id.* at 1-432.

[11]United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985).

why the standard instruction on a particular issue is inapplicable or inadequate.[12] Even if the military judge does not adopt the proposed instruction, counsel must be prepared to argue how the standard instruction should be tailored to their advantage, because the military judge must tailor the instructions to comply with the evidence in the case.[13]

The effective trial advocate should prepare drafts of specially requested instructions, novel instructions, or major modifications to standard instructions with case or statutory citations. The military judge may, in fact, require all proposed instructions to be submitted in writing pursuant to R.C.M. 920(c)[14] and the Rules of Court.[15] This practice has several benefits:

1) it saves the court's time;

2) the proposed instruction can be easily attached to the record as an appellate exhibit; and

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[12]United States v. Tilley, 25 M.J. 20 (C.M.A. 1987) (military judge's failure to give defense requested instruction on the combination of mental condition and involuntary intoxication was not error where subjects were fairly encompassed within other instructions).

[13]United States v. Smith, 33 C.M.R. 3 (C.M.A. 1963); United States v. Burns, 9 M.J. 706 (N.M.C.R. 1980). The military judge is not required to use the exact language in counsel's proposed instruction, even if the language is an accurate statement of the facts and law. United States v. Beasley, 33 C.M.R. 3 (C.M.A. 1963). In the event the military judge denies the requested instruction or precludes argument on the instruction, counsel should request the military judge to state the reasons on the record. Fletcher, *Instructions—An Under-Utilized Opportunity for Advocacy*, 10 The Advocate 7 (1978).

[14]R.C.M. 920(c) states:

> Requests for instructions. At the close of the evidence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on findings before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments.

Counsel should ensure that the military judge discusses instructions at an article 39(a) session rather than in front of the members. The military judge's denial of the requested instruction in front of the members could be devastating to your case. Failure to object to such a procedure after the failure of the military judge to hold a hearing on instructions will in most cases be treated as waiver. United States v. Williams, 26 M.J. 644 (A.C.M.R. 1988).

[15]R.C.M. 108; Benchbook, Appendix H. If counsel draft a new instruction it should be logically structured, easy to understand, and brief. The goal is to communicate clearly to the members of the court. Recommended sources for drafting instructions include: Elwork, Sales, & Alfini, Making Jury Instructions Understandable (1982); Wydick, Plain English For Lawyers (2d ed. 1985); Strunk & White, The Elements of Style (3d ed. 1979).

3) as a practical matter, a well-written proposed instruction will probably be more persuasive to the military judge.

While the Manual does not address when proposed instructions need to be provided to opposing counsel, the Rules of Court typically require submission to both the military judge and opposing counsel prior to the commencement of the out-of-court hearing on proposed instructions.[16]

Preparing for trial also requires obtaining a complete understanding of the applicable law so appropriate objections can be made to the instructions. Most instructions involve elements of both law and fact. Boilerplate instructions on the role of court personnel, procedural instructions, reasonable doubt, and burden of proof are usually not an issue.[17] Counsel are more typically faced with problems concerning the evidence supporting the instruction and whether a principle of law applies to the facts.[18]

If opposing counsel propose an instruction, counsel must be prepared to have them identify the evidentiary and legal basis for the proposed instruction. Counsel should specifically identify the objectionable portion of the instruction. Objections relating to a factual issue generally fall into one of four categories:

1) insufficient facts to support the instruction;

2) misstatement of the facts;

3) improper assumption of facts; or

4) ambiguous facts that could confuse or mislead the members.[19]

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[16]Local Rules of Court may establish different notice and submission rules. *But see* United States v. Williams, 23 M.J. 362 (C.M.A. 1987) (notice requirement of Rules of Court that conflicts with the Manual is invalid).

[17]*But see* United States v. Lawson, 16 M.J. 38 (C.M.A. 1983) (members taking a "straw poll" is not illegal, but "we do not believe that this practice merits encouragement"); United States v. Sniegowski, CM 442638 (A.C.M.R. 31 October 1983) (unpub.) (error—per se where members were instructed to vote on whether the accused had stolen any amount, and if they voted guilty, to write the amount stolen and inclusive dates of the theft; the military judge then took the lowest amount written and shortest duration as the finding); United States v. Salley, 9 M.J. 189 (C.M.A. 1980) (error to equate "substantial" doubt and "reasonable" doubt); United States v. Clark, CM 15007 (A.C.M.R. 7 April 1981) (unpub.) ("you must be satisfied that it is the right thing to do," hardly defines reasonable doubt); and United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986) (military judge improperly instructed that the defense of alibi must be proven beyond a reasonable doubt).

[18]Farrell, *Communication in the Courtroom: Jury Instructions*, 85 W. Va. L. Rev. 5 (1982).

[19]*Id.* at 34.

Objections to instructions relating to an issue of law generally fall into one of seven categories:

1) misstatement of the law;
2) confusing statement of the law;
3) improper submission of a legal issue to the members;
4) inconsistent instruction;
5) argumentative instruction;
6) incomplete instruction; or
7) irrelevant instruction.[20]

In the absence of plain error, counsel must raise such objections before the members close to deliberate to avoid waiving any objection to instructions.[21]

IV. PRELIMINARY INSTRUCTIONS

The preliminary instructions typically given the members of the court at the beginning of the trial include the following topics:

1) description of duties of the parties;
2) procedures to be followed in the court-martial;
3) voir dire;
4) challenges;
5) questions by the members;
6) general order of events in the trial; and
7) note taking.[22]

Although giving preliminary instructions is not required,[23] it is considered conducive to ensuring a fair trial and is the preferred practice.[24] Preliminary instructions tend to be very standard, but counsel must listen carefully to ensure that all instructions given are correct. A particular problem in this area is incorporating by reference

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[20]*Id.*
[21]R.C.M. 920(f); R.C.M. 1005(f).
[22]Benchbook, para. 2-24.
[23]R.C.M. 913(a) states: "Preliminary instructions. The military judge may give such preliminary instructions as may be appropriate."
[24]United States v. Ryan, 21 M.J. 627 (A.C.M.R. 1985), *pet. denied*, 22 M.J. 345 (C.M.A. 1986).

preliminary instructions given in other cases.[25] The problem with incorporating instructions by reference is that the appellate courts are precluded from finding no prejudice because they are unable "to ascertain the preliminary instructions in the previous court-martial."[26]

Counsel have a potential advocacy opportunity concerning instructions at this early stage of the trial. Trial counsel, for example, may find it advantageous to have the military judge instruct the members on the elements of the offense. Rather than risk confusion on the part of the members in an aiding and abetting case, trial counsel may request the military judge to provide an instruction on aiding and abetting[27] in the preliminary instructions. Otherwise there is a risk that the members of the court might conclude the accused is not guilty because the evidence presented establishes that another person actually "committed" the offense. Likewise, defense counsel may find that an instruction on a defense such as entrapment[28] or partial mental responsibility[29] assists in the presentation of the defense theory of the case.

Expanding the content of the preliminary instructions generally ensures a better informed court member. By providing the members of the court preliminary instructions, they are better able to understand the opening statements of counsel and the relevant law to be applied in deciding whether the accused is guilty or not guilty.[30]

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[25]United States v. Waggoner, 6 M.J. 77 (C.M.A. 1978); United States v. Hubert, 6 M.J. 887 (A.C.M.R. 1979); United States v. Blackowl 6 M.J. 816 (A.C.M.R. 1978), *pet. denied*, 6 M.J. 296 (C.M.A. 1979). These cases are examples where military judges improperly incorporated by reference preliminary instructions. In *Waggoner* the military judge instructed: "Since this court-martial panel has previously sat as a general court-martial it will not be necessary for me to repeat the preliminary instructions that I gave you previously." 6 M.J. at 78. The more egregious example comes from *Hubert*: "I would ask you to recall at this time those instructions that you have received from military judges on other occasions as to your duties and the duties of other personnel of this court." 6 M.J. at 888.

[26]*Waggoner*, 6 M.J. at 80.

[27]Benchbook, para. 7-1.

[28]*Id.* at para. 5-6.

[29]Benchbook, para.6-5. *See also* Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

[30]There is support for giving additional preliminary instructions than are normally given at courts-martial, such as reasonable doubt and key terms or defenses. Otherwise, the members may learn what they were supposed to be doing all along only before the court is closed. *See* Kassin and Wrightman, *On the Requirements of Proof, The Timing of Judicial Instruction and Mock Verdicts*, 37 J. Personality & Soc. Psych. 1877 (1979). Since jurors make up their minds early, there is some evidence that instructions given prior to the presentation of evidence resulted in test jurors viewing the defendant as "less likely to have committed the crime than either the instructions-after or no instructions subjects." *Id.* at 1881; Prettyman, *Jury Instructions—First or Last?*, 46 ABA J. 1066 (1960).

A. THE ABSENT ACCUSED

One infrequent but extremely important issue when it arises is what the members should be told when the accused is absent. After arraignment, if the accused voluntarily absents himself and had notice of the date of the trial, the court-martial can proceed without him.[31] No matter how effective a defense counsel may be in creating an appearance of normality, the members will eventually realize an essential party is absent, the accused.

First, defense counsel must ensure the military judge does not inform the members on findings that the absence is unauthorized.[32] Instead, defense counsel will probably want the military judge to instruct that there are various reasons why the accused may not be present and that the members may not draw any adverse inferences from his non-appearance.[33] The military judge has a sua sponte duty to instruct the members that the absence of the accused cannot be considered as proof of guilt.[34] Defense counsel may want the military judge to so instruct the members of the court not only before they deliberate on findings, but also when the members first enter the court and see the empty chair at the defense table.

The advocacy issue for defense counsel is to determine when this instruction becomes simply a painful reminder to the members that the accused is absent. Defense counsel may find it advantageous to waive the instruction after the members have been instructed once.[35]

Note that while the accused's absence is generally not to be considered on the issue of guilt, the absence may be considered insofar as it demonstrates the accused's rehabilitative potential under R.C.M. 1001.[36] Members may not appreciate that the accused's absence is not to be used as a basis for increased punishment. Thus, defense counsel should ensure that an appropriate limiting instruction on the

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[31]R.C.M. 804.

[32]United States v. Minter, 8 M.J. 867 (N.C.M.R.), *aff'd*, 9 M.J. 397 (C.M.A. 1980) (contains a sample instruction).

[33]*Id.* at 869.

[34]United States v. Denney, 28 M.J. 521 (A.C.M.R. 1989).

[35]This is but one of many situations in which defense counsel may request that an instruction not be given. This is an area without clear guideposts for counsel. Defense counsel should make these decisions after evaluating the posture of the evidence and the case, an analysis of the impact of the instruction, and a feel for the attitude of the members of the court.

[36]United States v. Chapman, 20 M.J. 717 (N.M.C.M.R. 1985), *aff'd*, 23 M.J. 226 (C.M.A. 1986) (sum. disp.).

accused's absence is given after trial counsel's argument. In *United States v. Denney*[37] the Army Court of Military Review recently visited this issue. While the military judge in *Denney* advised the members that they were not to sentence the accused for AWOL, "they were never apprised of the relevance of his absence to the sentencing process."[38] While the court found error, the lack of objection by the defense resulted in waiver. This is a useful case for trial counsel, because even though the military judge must sua sponte give an instruction that the evidence is only to be considered as to rehabilitative potential, the members may find the unauthorized absence from trial more egregious than the contested offense and may sentence the accused accordingly. Defense counsel should continue to argue that members should only be informed that the accused is absent and should not let the red flag of "unauthorized absence" be waved before the members.[39] Considering the United States Court of Military Appeals's general approach to the issue of "fairness" as paramount, the court could find that advising the members of an unadjudicated AWOL does not best serve the "interests of justice."[40]

B. MIXED PLEA CASES

A more common situation arises with respect to mixed pleas. At trial, an accused may plead guilty to one specification of distribution of cocaine but not guilty to another specification of distribution of hashish. What will counsel want the court members to be told concerning the pleas of the accused?

The Army Court of Military Review ventured into this area in *United States v. Nixon*[41] and in *United States v. Boland*.[42] In *Nixon* the members were given a flyer including all specifications and charges and advised of the charges to which the accused had entered pleas of guilty and not guilty. The court in *Nixon* criticized this prac-

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[37]28 M.J. 521 (A.C.M.R. 1989).

[38]*Id.* at 525.

[39]Counsel should fashion the argument based upon *Minter*, 8 M.J. 867 (N.C.M.R. 1980). *See also* DAD Note, *The Absent Accused: Gone But Not Forgotten*, The Army Lawyer, June 1989, at 26.

[40]*See, e.g.*, United States v. Rivera, 23 M.J. 89, 96 (C.M.A. 1986), *cert. denied*, 479 U.S. 1091 (1987); discussion under the next section concerning mixed plea cases.

[41]15 M.J. 1028 (A.C.M.R.), *pet. denied*, 17 M.J. 183 (C.M.A. 1983).

[42]22 M.J. 886 (A.C.M.R. 1986).

tice, referring to it as an "anachronism," but it did not find error.[43] Subsequent to *Nixon*, the 1984 Manual for Courts-Martial provided some guidance. The discussion to Rule for Courts-Martial 910(g) states that the military judge should consider and solicit the views of the parties, and that "[i]t is ordinarily appropriate to defer informing the members of the guilty plea until findings on the remaining specifications are entered."[44]

A more recent Army case in this area is a 1986 opinion, *United States v. Boland*.[45] While *Boland* recognized that pleas of guilty may be withheld from the members in rare instances when the defense counsel requests that the members not be informed, the Army Court of Military Review advised military judges that as a "general rule" they should inform the court members of all pleas in all cases.

Of course, the defense counsel's concern with this practice is fear of the "spill-over effect" of such an advisement. Once the members hear that the accused has admitted guilt as to one drug distribution offense, the other distribution finding may become a foregone conclusion.

With this background, the Court of Military Appeals decided the case of *United States v. Rivera*.[46] Sergeant Rivera had entered mixed pleas concerning sex-related offenses involving his adopted daughter. The defense counsel specifically requested that the members of the court not be informed of the guilty pleas until the sentencing phase of the trial because the charges were similar and involved the same victim. Trial counsel urged that the members be informed of all arraigned charges and pleas. The military judge over defense objection advised the members of all pleas in the case. He also gave

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[43]15 M.J. 1028 (A.C.M.R. 1983), *pet. denied*, 17 M.J. 183 (C.M.A. 1983). Due to the dissimilitary of offenses, the court found the members were not improperly influenced. The court added, however:

> While we find no error in this case, we believe that the practice of informing court members of the existence of a charged offense, and of a guilty plea and finding of guilty thereon prior to presentation of evidence on another charge to which an accused has pleaded not guilty is an anachronism.

Id. at 1030.

[44]R.C.M. 910(g) discussion.

[45]22 M.J. 886 (A.C.M.R. 1986). *Boland* noted that the *Nixon* case's discussion on not informing the members of prior guilty pleas until sentencing was "unfortunate language." The Army court expressed concern that the *Nixon* procedures would "encourage gamesmanship" and result in a negative reaction from the members on sentencing. *See also* DAD Note, *To Tell the Truth, the Whole Truth . . . ?*, The Army Lawyer, Oct. 1986, at 65.

[46]23 M.J. 89 (C.M.A. 1986), *pet. denied*, 479 U.S. 1091 (1987).

a limiting instruction advising the members that the guilty plea could not be considered in any way as evidence and that no inference could be drawn from the plea of guilty to a similar offense on the same day.[47]

Chief Judge Everett, writing for the court, noted that "[t]he dangers in allowing the factfinder to receive information about pleas of guilty to unrelated charges is especially great in courts-martial, because military law is very liberal in allowing the joinder of charges."[48] The court specifically rejected the advice of the Army court in *Boland* and noted that if military judges follow the advice in the R.C.M. 910(g) discussion, "the interests of justice will best be served."[49] Even though the court ruled that the judge erred in *Rivera*, the error was held non-prejudicial because the misconduct to which the accused had pled guilty had been admitted on the merits under Mil. R. Evid. 404(b) and a limiting instruction had been given to the members.

Less than a month after *Rivera* was decided, the Court of Military Appeals decided *United States v. Smith*.[50] In *Smith* the accused pled guilty to a three-day absence without leave and to use of marijuana, but he entered pleas of not guilty to charges of disobedience and a charge of use of cocaine. Defense counsel moved to amend the charge sheet, which was to be given to the members, so the members would not be informed of the guilty pleas. The military judge advised the members of all pleas and admonished the members that they could not consider the guilty pleas in deciding the contested offenses.

In its per curiam opinion, the court referred to *Rivera* and noted "that in the usual case, no lawful purpose is served by informing members prior to findings about any charges to which an accused has pled guilty. This is such a case."[51] The court in *Smith* further stated that even though the members were instructed not to consider guilty pleas as evidence, "we recognize the practical difficulty of putting out of one's mind something which has just been placed there; and where it was placed there for no useful purpose, the whole exercise seems futile."[52] The court found a substantial risk of prejudice to the accused concerning the contested cocaine offense

[47] *Id.* at 91.
[48] *Id.* at 95.
[49] *Id.* at 96.
[50] 23 M.J. 118 (C.M.A. 1986).
[51] *Id.* at 120.
[52] *Id.* at 121.

because the members were notified of the guilty plea to the "generically similar" marijuana use specification. As a result, the court reversed the finding of guilty to the cocaine specification.

These decisions reflect the Court of Military Appeals's continuing concern for fairness in the military justice process. The court, however, has not foreclosed informing the members of prior guilty pleas. In light of *Rivera*, *Smith*, and more recently *United States v. Davis*,[53] the defense counsel's tactical desires will be controlling.[54] The court also recognized that if defense counsel can articulate a proper purpose, the procedure for advising of mixed pleas, coupled with a limiting instruction, may serve the best interests of the accused.

Why would the defense counsel want the members to be informed of the accused's guilty pleas in a mixed plea case? In a proper case, the defense counsel could use the tactic of arguing that the accused has demonstrated good faith and pled guilty to all the offenses which he committed. For example, the accused might plead guilty to adultery but not guilty to the charge of rape. Informing the members of the guilty plea in such a case would be consistent with a defense theory of consensual sexual intercourse and may help establish credibility of the accused with the members.[55]

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[53]26 M.J. 445 (C.M.A. 1988).

[54]*Boland* also notes the truism, that once a specific defense request in this area is approved, the "appellant should not be heard to complain that because of such a decision he received an unfair trial." *Boland*, 22 M.J. at 891.

[55]Counsel should also consider the possibility of hostility by a court upon discovering the pleas of guilty at sentencing. For example, in *Boland* the accused plead guilty to two distributions of marijuana but not guilty to another distribution. The members were not informed of the guilty pleas and acquitted the accused of the contested distribution offense. At sentencing, the court members were advised of the prior guilty pleas to the two other distribution specifications. The appellant characterized his 20 year sentence as "the longest sentence to confinement on drug charges by a jury on Fort Campbell in recent memory." *Boland*, 22 M.J. at 888. Note that in United States v. Hickson, 22 M.J. 166 (C.M.A. 1986), the court held that an accused may not be convicted of rape and adultery arising out of a single act.

The current state of the law creates a continuing problem for trial counsel. Trial counsel will usually want to voir dire the members concerning the most serious offense even if the accused has plead guilty to that offense. Under current law, trial counsel is precluded from conducting a complete and adequate voir dire at the beginning of the trial. Counsel's only recourse is to wait until after findings to conduct this voir dire. The problem is that there is no specified procedure for conducting voir dire at this point and more important are the problems created if there is a basis to challenge the member after findings.

V. INSTRUCTIONS ON FINDINGS

R.C.M. 920 lists the required findings instructions that the military judge must give. Required findings instructions include:

1) elements of the charged offenses;

2) elements of any lesser included offenses in issue;

3) description of any special defenses in issue;

4) direction that members consider only those matters properly before the court;

5) presumption of innocence;

6) reasonable doubt;

7) burden of proof;

8) direction on procedures for deliberation and voting; and

9) "other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, sua sponte, should be given."[56]

This is not an exhaustive list of instructions. Thus it is incumbent upon counsel to request additional instructions helpful to their case.[57] Of course, counsel should examine whether it is to their advantage to incorporate selected instructions into closing argument. This advocacy technique may help to reinforce a key instruction or to give more credence to the argument because the military judge will tell, or has told,[58] the members about that same issue in the instructions on findings.

A. TAILORING

The military judge must tailor the instructions on findings to the facts of the case.[59] The military judge is not required, however, to comment upon the quality or quantity of the evidence.[60] Counsel, on the other hand, may request that the military judge give a theory

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[56]R.C.M. 920(e). The military judge has discretion in the order in which instructions are given, although most judges will follow the general sequence in the Benchbook. The sources of instructions, however, are not to be revealed to the members. R.C.M. 920(c) discussion.

[57]R.C.M. 920(c).

[58]We will examine the issue of timing of instructions on findings to the members during the section on delivery of instructions.

[59]Benchbook, para. 1-2; United States v. Smith, 33 C.M.R. 3 (C.M.A. 1963).

[60]United States v. Nickoson, 35 C.M.R. 312 (C.M.A. 1965) (military judge need not comment on or marshal the evidence of the parties).

of the case instruction.[61] This may be a particularly helpful instruction as it reinforces counsel's theory to the members of the court. For defense counsel this instruction may help foster reasonable doubt in the minds of the members.

If the military judge does summarize the evidence or give a theory of the case instruction, it must be done evenhandedly.[62] *United States v. Grandy*[63] is a classic example of where the military judge gave a detailed summary of the government's case concerning unlawfully receiving stolen property but gave nothing on the defense case or theory. The court said the military judge's marshalling of the evidence would have done credit to a prosecutor's argument. Counsel thus must be prepared to object and to propose counter-instructions if the military judge summarizes evidence unfairly.

Counsel must also ensure the military judge does not assume as true the existence or non-existence of disputed facts. In the case of *United States v. Gude*[64] the accused, who had been convicted of larceny, offered a statement of support on sentencing signed by twenty-six of the fifty-nine occupants in his barracks, who said that even though Gude was a thief, they still trusted him and were willing to have him back. The military judge instructed the members that because only twenty-six had signed the statement the members could justifiably infer that the other thirty-three occupants did not feel the same way.[65] This is yet another example of an improper instruc-

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[61]*See generally* Green and Hutton, *The Theory of the Case Instruction*, 15 The Advocate 149 (1983). In United States v. Vole, 435 F.2d 774 (7th Cir. 1970), the defense offered the following concise instruction:

> You are instructed that it is the defendant Vole's theory of the case that Charles Masini conspired with other persons to frame him for a counterfeiting conspiracy. If the facts adduced in support of the defendant Vole's theory, create in your mind a reasonable doubt of his guilt of these charges, then you must find the defendant Vole not guilty of these charges.

Id. at 776. The salutary effect for defense counsel in such an instruction is that it directly links the defense theory to reasonable doubt and concludes by advising the members they should find the accused not guilty if the theory of the case causes reasonable doubt.

[62]United States v. Grandy, 11 M.J. 270 (C.M.A. 1981).

[63]*Id.*

[64]21 M.J. 789 (A.C.M.R. 1986).

[65]*See also* United States v. Swoape, 21 M.J. 414 (C.M.A. 1985) (plain error not to instruct on unavailability of inference that testimony of missing witness would be unfavorable to the accused). *But see* United States v. Pasha, 24 M.J. 87 (C.M.A. 1987). "A permissive inference violates due process 'only if . . . there is no rational way' that the triers of fact could reach the conclusion suggested by the inference under the facts of the case." *Id.* at 90.

tion to which counsel must be prepared to object[66] and of where counsel must request a curative instruction.[67]

One of the practical problems faced by counsel is that of the unexpected tailored instruction. Most military judges do not read their entire instructions verbatim to counsel at the article 39a session or R.C.M. 802 conference when instructions are discussed. The military judge may only say, "I intend to give the standard instruction on the elements of rape." But trial counsel will not want the military judge to mention the use of threats if no threats were raised in the facts. Likewise, in a larceny case defense counsel will want to ensure that the military judge does not instruct on the inference raised when the property is found in the "knowing, conscious, and unexplained possession of the accused"[68] if the facts do not properly raise the inference. To avoid such problems counsel must be familiar with the

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[66]Trial counsel should object if the defense requests the military judge to instruct the members prior to findings concerning the mandatory life sentence for the offenses of premeditated murder or felony murder. The Court of Military Appeals rejected "jury nullification" as a rationale to have the members advised of the mandatory sentence prior to findings. United States v. Smith, 27 M.J. 25 (C.M.A. 1988). Trial counsel should also be aware of the holding in United States v. Shroeder, 27 M.J. 87 (C.M.A. 1988). The defense in *Shroeder* argued that the mandatory life sentence provisions of article 118 required a three-fourths vote for conviction by the members. The court rejected this argument and held that only two-thirds of the members must concur for conviction, except in capital cases.

[67]Curative instructions should be a particular area of interest for trial counsel, as they may save the case from reversal on appeal. For example, in United States v. Palumbro, 27 M.J. 565 (A.C.M.R. 1988), the prosecution's witness, a criminal investigator, improperly testified that the accused invoked his right to remain silent during an interview. In this case the military judge gave curative instructions that led to an affirmance on appeal.

A trial counsel's ability to propose curative instructions in such cases may avoid a mistrial or appellate reversal of the case. The Court of Military Appeals in United States v. Evans, 27 M.J. 34 (C.M.A.), *cert. denied*, 109 S. Ct. 797 (1988), reaffirmed that a curative instruction is preferable to the more drastic measure of a mistrial, provided this remedy is adequate.

Defense counsel's task is to ensure the instruction does cure the erroneous matter, that the members understand the instruction, and that they are questioned to ensure their ability to disregard the improper evidence.

Should counsel interrupt the military judge if an error is observed? Counsel may wish to wait until the military judge has finished giving the instructions. This approach will often be appreciated by the military judge. The advocacy decision for counsel, however, is evaluating the damage that may result from delaying a correction. While minor misstatements or omissions may be corrected at the close of instructions, counsel may find it necessary to interrupt the military judge if there has been a significant misstatement of the law or facts, or if the military judge has somehow confused the members. If a critical instruction is erroneous, a delayed correction of the error may not be effective. The objectionable instruction may be more difficult to disregard by the members once assimilated. McBride, The Art of Instructing the Jury 283-84 (1969 & Supp. 1978).

[68]Benchbook, para. 3-90.

specific instructions in the *Benchbook* so that they can anticipate potential problems. In addition, counsel may wish to ask the military judge to elaborate when, for example, the judge says, "I intend to instruct on self-defense."[69]

The effective trial advocate also wants to ensure that the military judge does not erroneously combine instructions. In *United States v. Clarke*[70] the military judge intended to instruct on indecent acts. In the instruction, however, the military judge combined the indecent acts instruction with one concerning fraternization based upon the military relationship of the parties. The court ruled that the instructions were "so confusing that they resulted in substantial prejudice" to the accused.[71]

B. ELEMENTS OF THE OFFENSES

The military judge has a sua sponte duty to instruct on the elements of the charged offenses.[72] To protect the case, trial counsel should follow the military judge as instructions are given to the members on the elements of the offense. The Court of Military Appeals recently reaffirmed that the failure to instruct on an element of an offense is plain error.[73] In *United States v. Brown*[74] the military judge instructed the members on a specification for use of marijuana based upon a positive urinalysis. The accused denied any conscious use of the drug and produced witnesses attesting to his good military character and his character for truthfulness. The military judge fail-

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[69]*Id.* at para. 5-2. There is no standard self-defense instruction.

[70]25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

[71]*Id.* at 634. *Compare* United States v. Hargrove, 25 M.J. 68 (C.M.A. 1987), *cert. denied*, 109 S. Ct. 76 (1988), where the military judge added the word "if" to an instruction on murder while engaging in an inherently dangerous act. The addition of this one small word raised an issue on appeal whether this addition erroneously permitted a conviction with "proof of knowledge of the probable results of the perpetrated act," and thus "blurred the distinction between unpremeditated murder and manslaughter." The court, however, held that the full instructions adequately set forth the necessary knowledge requirement and further, because the defense counsel did not object at trial, that the issue was waived.

[72]R.C.M. 920(e) (1); United States v. Johnson, 25 M.J. 878 (N.M.C.M.R. 1988). The military judge failed to instruct on the "timing relationship between the overt act and the appellant's becoming a co-conspirator." *Id.* at 884.

[73]United States v. Mance, 26 M.J. 244 (C.M.A.), *cert. denied*, 109 S. Ct. 367 (1988).

> [T]he military judge should instruct the court members that, in order to convict, the accused must have known that he had custody of or was ingesting the relevant substance and also must have known that the substance was of a contraband nature—regardless whether he knew its particular identity. The judge must give this instruction even absent a defense request . . . .

Id. at 256.

[74]26 M.J. 266 (C.M.A. 1988).

ed to instruct the members on the need to find that the use was with knowledge by the accused of the contraband nature of the substance. This failure to instruct in *Brown* could not be tested for harmlessness. The findings and sentence were set aside.[75]

The military judge must also define terms for the members[76] and let the members decide if the accused's acts constitute the offense.[77] Lay members readily understand many terms, and in such cases there is no sua sponte duty on the part of the military judge to explain every term or concept.[78] The wisest practice for counsel is not to assume members know legal terms and to request further instruction when necessary to avoid the possibility of an improper finding by the court.[79]

In *United States v. Fayne*[80] the accused was convicted of "harassment" under article 134 of the Code for placing a substance he alleged to be rat poison and Drano into the victim's food, toothpaste, and tobacco. The harassment conviction was dismissed based upon the military judge's failure to define "harassment" for the members. In

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[75]*Id.* at 267.

[76]United States v. Johnson, 24 M.J. 101 (C.M.A. 1987) (instructions on sabotage were inadequate where the military judge failed to give any definition of the terms "national defense material" or "troops" as used in the statute).

[77]United States v. Joyce, 22 M.J. 942 (A.F.C.M.R. 1986). The military judge should have defined "disposed of" in a wrongful disposition of military property case. The military judge in *Joyce* also gave the following instruction to the members: "You are further advised as a *matter of law* in this case, if the accused placed or caused to be placed in his hold baggage for shipment pursuant to PCS orders military property of the United States, then *he disposed of that property without authority* . . . . " Under the facts of the case the instruction given by the military judge "was tantamount to a directed verdict of guilty—a practice not permitted in military law." *Id.* at 943.

[78]R.C.M. 920(e)(7) states the military judge should give such "explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines sua sponte, should be given." United States v. McDonald, 20 C.M.R. 291, 293 (C.M.A. 1955). "[I]nstructions defining words of common usage, military terms and phrases well known in the services, and matters of clarification, or amplification, need not be given without a request on the part of the accused."

[79]Even if a term is commonly used, counsel should remember that "a slight variation in application of the terms might arise under some factual situations which might make their definitions necessary." United States v. Day, 9 C.M.R. 46, 52 (C.M.A. 1953). Keep in mind the courts have held that relatively few terms must be given sua sponte by the military judge. *See, e.g.*, United States v. Felton, 10 C.M.R. 128 (C.M.A. 1953) (no sua sponte duty to define "premediation"). To avoid a potential "miscarriage of justice" counsel should ensure that terms such as "contemptuous," "culpable inefficiency," "culpable negligence," "disfigurement," "dwelling house," and numerous other terms are clear to the members. *See* United States v. Gomez, 15 M.J. 954 (A.C.M.R. 1983), *pet. denied*, 17 M.J. 282 (C.M.A. 1984) (sample instruction defining death as "brain death").

[80]26 M.J. 528 (A.F.C.M.R. 1988).

such cases the members of the court must clearly understand the terms, especially when the terms constitute a critical element of the offense. While the military judge has the responsibility to properly instruct on key terms, counsel should not permit an omission to damage their case.[81] If the military judge gives an erroneous or confusing instruction, counsel may ask the military judge to give the instruction again, to restate a questioned element, or to give a supplemental instruction to help avoid confusion.[82]

C. LESSER INCLUDED OFFENSES

The military judge also has a sua sponte duty to instruct the members on any lesser included offenses reasonably raised by the evidence and included in the scope of the pleadings.[83] The military judge should introduce the lesser included offenses, give the elements of the offenses, and then describe the differences between the greater and lesser included offenses.[84] The critical issue for counsel is how much evidence is needed to require an instruction on a lesser included offense. The answer is that if counsel can point to "any evidence" reasonably raising the lesser included offense the instruction should be given.[85] Defense counsel will want to assert that any doubt whether the lesser included offense is raised should be resolved in favor of the accused.[86]

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[81]United States v. Sanders, 34 C.M.R. 304 (C.M.A. 1964); *see also* United States v. Billig, 26 M.J. 744 (N.M.C.M.R. 1988) (military judge failed to define the standard of care required of cardiothoracic surgeons in a case involving manslaughter arising out of open heart surgery); United States v. Branchler, 15 M.J. 755 (A.F.C.M.R. 1985) (military judge failed to instruct on the definition of indecent liberties).

[82]United States v. Williams, 25 M.J. 854 (A.F.C.M.R. 1988). One peculiarity with regard to the elements of an offense deals with the violation of a regulation. The early case of United States v. Verdi, 5 M.J. 331 (C.M.A. 1976), caused some consternation for trial counsel. In *Verdi* the accused, an Air Force captain, was charged with wearing a wig in violation of an Air Force regulation. The regulation proscribed such wear *unless* one had a disfigured head. In *Verdi* the Court of Military Appeals stated that the government had an affirmative duty to prove the accused does not come within any exception of the regulation. Later the Court of Military Appeals in United States v. Cuffee, 10 M.J. 381 (C.M.A. 1981), realized that in *Verdi* they had confused the burden of going forward with the burden of proof. The rule of *Cuffee* is that the government need not plead the exception. The accused has the burden of going forward with evidence to raise the applicability of the regulatory exception. Once raised the government has the burden of proof to show the exception does not apply, and the members should be so instructed.

[83]R.C.M. 920(e) (2); United States v. Rodwell, 20 M.J. 264 (C.M.A. 1985).

[84]Benchbook, para. 2-28.

[85]*Rodwell*, 20 M.J. at 264; United States v. Wilson, 26 M.J. 10 (C.M.A. 1988); United States v. Waldron, 11 M.J. 36 (C.M.A. 1981); United States v. Jackson, 6 M.J. 261 (C.M.A. 1979).

[86]*Rodwell*, 20 M.J. at 264.

Trial counsel should ensure that the defense position is not based solely on the "credibility" of a witness. Credibility of a witness will be an issue in most cases, yet something more is required to raise a lesser included offense. There still must be "some evidence" reasonably raising the issue of guilt of the lesser included offense.[87] The *Waldron*[88] case provides an example of when trial counsel should articulate to the military judge why a lesser included offense instruction should not be given. Waldron was a Marine guard at the Cairo embassy, where the Egyptian guards often fell asleep at their posts. The accused woke one of the guards in the middle of the night. Waldron claimed the guard reached for his weapon, causing him to shoot the Egyptian in the head. Waldron was charged with murder. The military judge instructed the members on several lesser included offenses, including assault consummated by battery. Trial counsel should have objected. There was no issue as to the death of the victim and therefore the battery instruction was improper.[89]

Waldron represents the exception to the rule. Typically trial counsel should resolve any doubt as to whether an instruction on a lesser included offense should be given in favor of the accused. This should not pose a significant problem for trial counsel because the members of the court vote on the lesser included offense only after they have found the accused not guilty of the greater offense.[90]

An important advocacy decision for defense counsel in this area is whether to waive the lesser included offense instruction and go for "all or nothing" concerning findings on the charged offense. In *United States v. McCray*[91] the defense counsel requested that no lesser included offense be given in a sodomy case, and the military judge acceded to the request. The court stated that while there is a sua sponte duty to instruct on all lesser included offenses, the military judge may grant defense counsel's request, concurred in by the accused, to refrain from instructing the members. The court went

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[87]United States v. McCray, 19 M.J. 528 (A.C.M.R. 1984).
[88]United States v. Waldron, 11 M.J. 36 (C.M.A. 1981).
[89]*Id.*
[90]R.C.M. 921(c) (4) states:
Included offenses. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of a charge has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue to vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.
[91]15 M.J. 1086 (A.C.M.R.), *pet. denied*, 17 M.J. 36 (C.M.A. 1983).

on to say that if granted, the defense will be precluded from contesting the issue on appeal. The strength or weakness of the government's case will dictate whether defense counsel should employ this tactic.[92] A weak government case on the charged offense may warrant waiver of the instruction to prevent conviction on a lesser included offense that may be more palatable to the members of the court.[93]

The recent case of *United States v. Wilson*[94] contains lessons for both trial and defense counsel. In *Wilson* the defense counsel requested an instruction on involuntary manslaughter under article 119(b)(1) of the Code as a lesser included offense of premeditated murder. The trial counsel argued that the facts did not raise an issue of culpable negligence. The military judge agreed and did not give the requested instruction. Counsel had failed, however, to consider the possibility of involuntary manslaughter resulting from an unlawful killing under article 119(b)(2) as a lesser included offense. Since there was "some evidence" of the lesser included offense, the omission led to a reversal. The need for a fair trial requires the military judge to instruct on all lesser included offenses. If there is "any doubt whether the evidence is sufficient to raise the need to instruct on a lesser included offense [the doubt] must be resolved in favor of the accused."[95]

D. DEFENSES

The military judge must give an instruction on any defense reasonably raised.[96] The test of whether a defense is reasonably rais-

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[92]*See also* United States v. Pasha, 24 M.J. 87, 91 (C.M.A. 1987).

[93]Variance is another instruction trial counsel may want to ensure is given. This instruction is appropriate in most cases and advises the members that if the evidence indicates the accused may have committed an offense at a time, place, or manner different from that alleged in the specification, the members may make modifications in reading their findings by changing the time, place, or manner, as long as the nature or identity of the offense is not changed. Benchbook, para 7-15. This instruction is very helpful to an inexperienced panel that otherwise may view a minor variance as a fatal defect in the government's case.

[94]26 M.J. 10 (C.M.A. 1988).

[95]United States v. Steinwick, 11 M.J. 322 (C.M.A. 1981); United States v. Staten, 6 M.J. 275 (C.M.A. 1979).

[96]United States v. Taylor, 26 M.J. 127 (C.M.A. 1988) ("the instructional duty arises whenever 'some evidence' is presented to which the fact finders might 'attach credit if' they so desire." *Id.* at 129-30 (citing United States v. Jackson, 12 M.J. 163-67 (C.M.A. 1981)). "[T]he defense theory at trial is not dispositive in determining what affirmative defenses have been reasonably raised by the evidence . . . . " *Taylor*, 26 M.J. at 131. *See* United States v. Jones, 7 M.J. 441 (C.M.A. 1979); United States v. Mathis, 35 C.M.R. 102 (C.M.A. 1964).

ed is whether some evidence is contained in the record.[97] In determining whether to give an instruction on a defense, the military judge must not weigh the credibility of the evidence.[98]

If a special defense[99] is raised by some evidence the military judge has a sua sponte duty to instruct the members.[100] Special defenses, sometimes called affirmative defenses,[101] are as follows:

1) justification;[102]

2) obedience to orders;[103]

3) self-defense;[104]

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[97]United States v. Tan, 43 C.M.R. 636 (A.C.M.R. 1971). *See also* R.C.M. 916(b) discussion: "A defense may be raised by evidence presented by the defense, the prosecution, or the court-martial."

[98]United States v. Brooks, 25 M.J. 175 (C.M.A. 1987) (military judge must not weigh the credibility of alibi evidence); United States v. Ferguson, 15 M.J. 12 (C.M.A. 1983) (military judge should instruct on the defense of accident even if the issue is only raised by the self-serving testimony of the accused). *See also* Mathews v. United States, 108 S. Ct. 883 (1988) (judge required to instruct on defense of entrapment even if accused denies one or more elements of the crime). *But see* United States v. Brown, 19 C.M.R. 363 (C.M.A. 1955); and United States v. Franklin, 4 M.J. 635 (A.F.C.M.R. 1977) (military judge is not required to instruct if it is wholly incredible or unworthy of belief).

[99]R.C.M. 916 (a) states: "In general. As used in this rule, 'defenses' includes any special defense which, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly or partially, criminal responsibility for those acts."

[100]R.C.M. 920(e) (3); United States v. Sawyer, 4 M.J. 64 (C.M.A. 1977); United States v. Graves, 1 M.J. 50 (C.M.A. 1975).

[101]R.C.M. 916(a) discussion.

[102]R.C.M. 916(c) states: "Justification. A death, injury, or other act caused or done in the proper performance of a legal duty is justified and not unlawful." *See also* United States v. Evans, 38 C.M.R. 36 (C.M.A. 1967); United States v. Regaldo, 33 C.M.R. 12 (C.M.A. 1963).

[103]R.C.M. 916(d) states: "Obedience to orders. It is a defense that the accused was acting pursuant to orders unless the accused knew the orders to be unlawful or a person of ordinary sense and understanding would have known the orders to be unlawful." *See also* United States v. Calley, 48 C.M.R. 19 (C.M.A. 1973); United States v. Cooley, 36 C.M.R. 180 (C.M.A. 1966).

[104]R.C.M. 916(e) (1)-(3) enumerates the defenses of self-defense in relation to charges of homicide and of assaults under articles 90, 91, and 128 and the degrees of force that can be employed in each case. R.C.M. 916(e) (4) also specifies when the right of self-defense is lost. *See also* United States v. Rose, 28 M.J. 132, 135 (C.M.A. 1989) ("Appellant's belief that he was in danger of death or serious bodily injury could be evidenced circumstantially."); United States v. Sawyer, 4 M.J. 64 (C.M.A. 1977); United States v. Jones, 3 M.J. 279 (C.M.A. 1977); United States v. Jackson, 36 C.M.R. 101 (C.M.A. 1966); United States v. Green, 33 C.M.R. 77 (C.M.A. 1963); United States v. Brown, 33 C.M.R. 17 (C.M.A. 1963); United States v. Smith, 33 C.M.R. 3 (C.M.A. 1963); United States v. Acosta-Vargas, 32 C.M.R. 388 (C.M.A. 1962).

4) defense of another;[105]

5) accident;[106]

6) entrapment;[107]

7) coercion or duress;[108]

8) inability;[109]

9) ignorance or mistake of fact;[110]

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[105]R.C.M. 916(e) (5) states: "The principles of self-defense . . . apply to defense of another . . . provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances." *See also* United States v. Wilson, 26 M.J. 10 (C.M.A. 1988); United States v. Regalado, 33 C.M.R. 12 (C.M.A. 1963); United States v. Tanksley, 7 M.J. 573 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980).

[106]R.C.M. 916(f) states: "Accident. A death, injury, or other event which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner is an accident and excusable." *See also* United States v. Tucker, 38 C.M.R. 349 (C.M.A. 1968); United States v. Redding, 24 C.M.R. 22 (C.M.A. 1963); United States v. Small, 45 C.M.R. 700 (A.C.M.R. 1972).

[107]R.C.M. 916(g) states: "Entrapment. It is a defense that the criminal design or suggestion to commit the offense originated in the government and the accused had no predisposition to commit the offense." *See also* United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982). *Cf.* United States v. Eckhoff, 27 M.J. 142 (C.M.A. 1988) (military judge improperly instructed that the accused's profit motive negated an entrapment defense).

[108]R.C.M. 916(h) states:

> Coercion or duress. It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or other innocent person to the harm threatened, this defense shall not apply.

See also United States v. Jemmings, 1 M.J. 414 (C.M.A. 1976); United States v. Pinkston, 39 C.M.R. 261 (C.M.A. 1969).

[109]R.C.M. 916(i) states: "Inability. It is a defense to refusal or failure to perform a duty that the accused was, through no fault of the accused, not physically or financially able to perform the duty." *See also* United States v. Cooley, 36 C.M.R. 180 (C.M.A. 1966); United States v. Pinkston, 21 C.M.R. 22 (C.M.A. 1956).

[110]R.C.M. 916(j) states:

> Ignorance or mistake of fact. Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

See also United States v. Gamble, 27 M.J. 298 (C.M.A. 1988) (sua sponte duty on military judge to instruct on mistake of fact when reasonably raised); United States v. Turner, 27 M.J. 217 (C.M.A. 1988) (error where military judge failed to give defense requested mistake of fact instruction where prior statement of accused offered by the prosecution provided a "questionable" belief that the accused could lawfully receive the stolen property).

10) lack of mental responsibility;[111]

11) partial mental responsibility;[112] and

12) voluntary intoxication.[113]

More than one defense may be raised by the evidence, and they need not be consistent.[114] The fact that the military judge must instruct on every special defense in issue presents a tactical problem for the defense. The military judge may turn to counsel to ascertain the defense theory in order to give the correct instruction.[115] If the military judge does not ask, counsel should assert the defense theory and waive any inconsistent defenses.[116] This should not present a problem because defense counsel must consider any potential defenses prior to opening the case. The effective defense counsel thus has an opportunity to point out the evidence that the court members "might 'attach credit if' they so desire"[117] and to present a theory of the case that will not be confusing to the members. The Court of Military Appeals has never specifically answered whether the

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[111]R.C.M. 916(k) (1) states:

> Lack of mental responsibility. It is an affirmative defense to any offense that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his or her acts. Mental disease or defect does not otherwise constitute a defense.

See also United States v. Frederick, 3 M.J. 230 (C.M.A. 1977).

[112]Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (invalidates R.C.M. 916(k) (2); partial mental responsibility is a defense where a special state of mind is necessary to be proven as an element of the offense).

[113]R.C.M. 916(1) (2) states:

> Voluntary intoxication. Voluntary intoxication, whether caused by alcohol or drugs, is not a defense. However, evidence of any degree of voluntary intoxication may be introduced for the purpose of raising a reasonable doubt as to the existence of actual knowledge, specific intent, willfulness, or premeditated design to kill is an element of the offense.

See also United States v. Hernandez, 43 C.M.R. 59 (C.M.A. 1970); United States v. Ferguson, 38 C.M.R. 239 (C.M.A. 1968); United States v. Box, 28 M.J. 584, 585 (A.C.M.R. 1989) (The accused is not entitled to instruction concerning "possible effect of intoxication" on his ability to form an intent to impose grievous bodily harm. "In short, it is not enough to show that alcohol may have clouded the appellant's judgment; there must be credible evidence that the alcohol removed his ability to make *any* judgment.").

[114]R.C.M. 916(b) discussion. *See, e.g.*, United States v. Garcia, 1 M.J. 26 (C.M.A. 1975).

[115]United States v. Bellamy, 47 C.M.R. 319 (A.C.M.R. 1971); United States v. Collier, 27 M.J. 806 (A.C.M.R. 1988) (military judge has sua sponte duty to instruct on the affirmative defense of divestiture or abandonment of office if reasonably raised).

[116]*See* United States v. Hunter, 21 M.J. 240, 242 n.4 (C.M.A.), *cert. denied*, 476 U.S. 1142 (1986) (both agency and entrapment were raised; defense counsel waived entrapment, but then the defense elicited information concerning entrapment; the military judge properly instructed on entrapment).

[117]*Jones*, 26 M.J. at 130 (citing United States v. Jackson, 12 M.J. 163, 166-67 (C.M.A. 1981)).

defense may waive special defense instructions for tactical reasons. But given the fact that "[f]ailure to object . . . to omission of an instruction . . . constitutes waiver . . . in the absence of plain error" the military judge will normally grant defense counsel's request.[118]

While the military judge has a sua sponte duty to instruct on all special defenses raised by the evidence, the burden is on defense counsel to request an instruction on the other "defenses" such as alibi[119] or good character.[120] Unlike special defenses, alibi and good character operate to deny that the accused committed acts constituting the offense.[121] Thus, the apparent rationale for requiring a defense request for an instruction on alibi and good character is that, as opposed to confession and avoidance, they represent merely a denial of guilt and require no further instruction. Whether the instruction is given sua sponte or upon request defense counsel must ensure the instruction does not improperly shift the burden of proof to the defense.[122]

E. EVIDENTIARY INSTRUCTIONS

Evidentiary instructions are included in chapters 4 and 7 of the *Benchbook*. The general rule is that counsel must request evidentiary instructions. The scope of evidentiary instructions and considerations is extensive. This article will briefly examine only three areas of interest to counsel: accomplice testimony; uncharged misconduct; and the accused's failure to testify.[123]

1. Accomplice Testimony

The accomplice testimony instruction,[124] which points out the motive to falsify by one criminally involved in the same offense as

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[118]R.C.M. 920(f).

[119]United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986); United States v. Boyd, 17 M.J. 562 (A.F.C.M.R. 1983), *pet. denied*, 18 M.J. 28 (C.M.A. 1984). *See* R.C.M. 701(b)(1) concerning notice of alibi.

[120]United States v. Robinson, 11 M.J. 218 (C.M.A. 1981), *pet. denied*, 14 M.J. 162 (C.M.A. 1982). *See also* United States v. Yarborough, 18 M.J. 452 (C.M.A. 1984) (ambiguous defense request did not require the military judge to give a specific character evidence instruction).

[121]R.C.M. 916(a) discussion.

[122]United States v. Stafford, 22 M.J. 825 (N.M.C.M.R. 1986) (military judge improperly instructed that the defense of alibi must be proven beyond a reasonable doubt).

[123]For an excellent review of recent instructions cases involving evidentiary issues see Green, *Annual Review of Developments In Instruction*, The Army Lawyer, April 1989, at 34, and Green, *Recent Developments In Instructions*, The Army Lawyer, March 1987, at 35.

[124]Benchbook, para 7-10.

the accused and that such testimony should be considered with great caution, normally must be requested by the defense counsel. But if accomplice testimony is "critical," "pivotal," or the "whole case," then there is a sua sponte duty on the part of the military judge to give the instruction.[125] What constitutes "pivotal" testimony was discussed in *United States v. Lee*.[126] In *Lee* the testimony of an accomplice fingered the accused, but the accused had already confessed. No instruction was requested and none was given. The court held that because the accused had confessed, the accomplice testimony was not so critical or pivotal; thus the instruction was not required.

The accomplice instruction may be of assistance to both sides. While the instruction is normally given concerning government witnesses, trial counsel may request that the same instruction be given for defense witnesses who are accomplices.[127] The giving of the instruction in this situation is within the discretion of the military judge. Trial counsel should argue to the military judge that an accomplice has just as much reason to lie for the accused as for the government[128] and thus that the instruction should be given so the members can properly weigh such testimony.

2. Uncharged Misconduct

Uncharged misconduct has been an area that has undergone significant instructional changes. A key case in this area had been *United States v. Grunden*,[129] one of former Chief Judge Fletcher's "paternalistic" cases. This case involved a charge of espionage. During the trial several acts of uncharged misconduct were revealed. The defense counsel did not request a limiting instruction and none was given. The case included the often quoted language that "no evi-

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[125]United States v. Lee, 6 M.J. 96 (C.M.A. 1978); United States v. Stephen, 35 C.M.R. 286 (C.M.A. 1965); United States v. Oxford, 21 M.J. 983 (N.M.C.M.R. 1986); United States v. Adams, 1 M.J. 996 (A.C.M.R. 1985); United States v. DuBose, 19 M.J. 877 (A.F.C.M.R. 1985), *pet. denied*, 21 M.J. 147 (C.M.A. 1985).

[126]6 M.J. 96 (C.M.A. 1978). *See also* United States v. Hand, 8 M.J. 701 (A.F.C.M.R. 1980), *rev'd on other grounds*, 11 M.J. 321 (C.M.A. 1981) (undercover agent who buys and smokes marijuana is not criminally liable and not an accomplice); United States v. Combest, 14 M.J. 927 (A.C.M.R. 1982), *pet. denied*, 15 M.J. 324 (C.M.A. 1983) (paid informant is not an accomplice and there is no sua sponte duty on the military judge to instruct).

[127]United States v. Allison, 8 M.J. 143 (C.M.A. 1979) (instruction used for defense witness, with defense counsel concurrence, but C.M.A. did not resolve the issue); United States v. Moore, CM 434716 (A.C.M.R.) (unpub), *pet. denied*, 9 M.J. 426 (C.M.A. 1980) (instruction used for defense witness).

[128]*See* United States v. Moore, CM 434716.

[129]2 M.J. 116 (C.M.A. 1977).

dence can so fester in the minds of court members as to the guilt or innocence of the accused as to the crime charged as evidence of uncharged misconduct."[130] *Grunden* held that the military judge must instruct an uncharged misconduct, despite a defense request not to give the instruction.

Later cases such as *United States v. Montgomery*[131] stated that if the uncharged misconduct was part of the "chain of events" leading to the charged offense or "part and parcel" of the crime, there was no requirement to give the instruction. The facts in *Montgomery* warrant repeating because of the unique sequence of events. Montgomery was stationed in Berlin. One evening he and a buddy went out and picked up a woman, and they ended up at her apartment. After she performed oral sex on Montgomery, they disrobed the woman but were surprised to find out she was a man. Montgomery and his friend became angry, decided to beat up the female impersonator, and then took his money as compensation for the charade. Montgomery was charged only with robbery, not sodomy, but at trial the evidence of the sodomy was introduced. The military judge did not give the uncharged misconduct instruction and the court refused to find error, noting this was an example of the "part and parcel" rule.[132]

In *United States v. Thomas*[133] the Court of Military Appeals put the final nails in the *Grunden* coffin by declaring evidence of uncharged misconduct that is inextricably related in time and place to the offenses charged need not be the subject of a sua sponte limiting instruction. The court also held that when the uncharged misconduct is not so closely related "the judge has some obligation to give an instruction on 'uncharged misconduct'—at least, in the absence of a defense request to the contrary."[134]

Military Rule of Evidence 105 states that when evidence is admitted for one purpose, but not another, the military judge shall, upon request, instruct the members to restrict the evidence to its proper scope.[135] The burden is seemingly on counsel to request the instruc-

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[130] *Id.* at 119.

[131] 5 M.J. 832 (A.C.M.R.), *pet. denied*, 6 M.J. 89 (C.M.A. 1978). *See also* United States v. Dagger, 23 M.J. 594, 598 (A.F.C.M.R. 1986), *pet. denied*, 25 M.J. 241 (C.M.A. 1987) (no sua sponte duty to instruct where the evidence "formed a link in the criminal chain of events").

[132] 5 M.J. at 835.

[133] 11 M.J. 388 (C.M.A. 1981).

[134] *Id.* at 392.

[135] Mil. R. Evid. 105.

tion and specify the misconduct.[136] But the recent case of *United States v. McIntosh*[137] found error where the military judge did not provide a limiting instruction, and defense counsel requested none, after trial counsel introduced evidence that the accused had been counselled concerning bad debts in an attempt to show motive in this graft case. The court did not distinguish this case from Military Rule of Evidence 105. Until this conflict is resolved, defense counsel should be prepared to make a specific request for the instruction if it is desired. On the other hand, if counsel believe that on balance the instruction will unnecessarily highlight the misconduct, they should specifically request that the military judge not give the instruction.

3. Accused's Failure to Testify

Should defense counsel request an instruction when the accused fails to testify? The U.S. Supreme Court[138] and the Military Rules of Evidence[139] mandate the giving of the instruction when requested. Military Rule of Evidence 301(g) states:

> When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice.[140]

While defense counsel's election is normally binding on the military judge, the last part of the rule raises the issue as to when the military judge may give this instruction over the objection of defense counsel. This is another area where the judge exercises a great deal of discretion. One example where the military judge could and should give the instruction over defense objection is when the members ask

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[136]If counsel decide the instruction is tactically advantageous, they should also ensure the military judge specifies the misconduct. *See* United States v. Logan, 18 M.J. 606, 608 n.2 (A.F.C.M.R. 1984) (general instruction on uncharged misconduct "more apt to confuse than to enlighten").

[137]27 M.J. 204 (C.M.A. 1988).

[138]Carter v. Kentucky, 450 U.S. 288 (1981).

[139]Mil. R. Evid. 301(g).

[140]*Id. See also* Lakeside v. Oregon, 435 U.S. 333 (1978). Giving the failure to testify instruction over defense counsel objection does not violate the accused's rights, but "[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant's objection." *See also* United States v. Charette, 15 M.J. 197 (C.M.A. 1983).

a question concerning the accused's silence.[141] Under these circumstances, the interests of justice require the military judge to caution the members not to draw any adverse inference from the accused's failure to testify.

VI. DELIVERY OF INSTRUCTIONS

When and how instructions will be delivered are two overlooked areas of the law. The Manual specifies that instructions "shall be given after arguments by counsel and before the members close to deliberate on findings."[142] Despite this rule, in 1984 the 5th Judicial Circuit in Europe established the practice of instructing the members, except for voting procedures, prior to arguments of counsel.[143] Both members and counsel indicated a preference for the delivery of instructions before arguments. Instructions prior to arguments enhanced the members' understanding of the issues because counsel could refer to the instructions the members had already received. Arguments of counsel are more understandable if the members already have the case's legal framework. Should any confusion arise with respect to instructions after argument, the military judge could then make any necessary clarification. Thus, counsel may wish to request that instructions be given prior to argument.

Counsel should recognize that in light of the Manual guidance, a military judge certainly would not err by denying the request. On the contrary, the military judge would most assuredly err if he complied with a request to give instructions before argument and counsel for either side objected.[144]

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[141]United States v. Jackson, 6 M.J. 116 (C.M.A. 1979).

[142]R.C.M. 920(b).

[143]Former Chief Circuit Judges Colonel George C. Ryker (now retired), Colonel Jack P. Hug (currently SJA, 6th Army), and one of the authors developed a boilerplate designed to provide the members instructions on findings prior to arguments of counsel. This boilerplate was in use by the majority of military judges from 1984-1987.

[144]*See* United States v. Santiago-Davilla, 26 M.J. 380 (C.M.A. 1988) (military judge instructed members prior to argument; court noted anomaly by citing to R.C.M. 920(b) without further comment). *See also* United States v. Pendry, 29 M.J. 694 (A.C.M.R. 1989) (military judge delivered instructions prior to closing arguments on findings; defense counsel did not object; error was waived).

> The Federal Rules of Criminal Procedure were amended in 1988 to permit a federal judge, in his discretion, to instruct the jury "before or after the arguments are completed or at both times." Fed.R.Crim.P. 30. The greater flexibility afforded by such modification would be beneficial in the military justice system. We recommend amendment of R.C.M. 920(b) to conform with federal practice.

Id. at 695 n.1.

The Manual also provides that instructions on findings are normally given orally, but written instructions may be given to the members, or even portions of the instructions may be given in writing, unless counsel for either side objects.[145] Unless both parties agree, it's all or nothing concerning written instructions.

This is an intriguing area because it raises the issue of the efficacy of oral instructions. Some studies have shown that a large proportion of jurors do not understand the instructions they receive and often do not follow them in the deliberation room.[146] Colonel James Gayle Garner[147] used a portable computer containing *Benchbook* instructions to print out the instructions he provided to the members.[148] This practice may be very beneficial for counsel as they can preview an instruction *before* it is delivered by the military judge. Court members can also benefit from such a procedure because they can review critical instructions in the deliberation room.[149]

How does this relate to counsel? The good trial advocate will want the case and final argument to be supported by the instructions. But how realistic is it that members will grasp the mass of findings instructions and particularly that specific instruction upon which the theory the case is based? Counsel therefore may want instructions

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[145]R.C.M. 920 states: "(d) How given. Instructions on findings shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or, unless a party objects, portions of them, may also be given to the members for their use during deliberations."

[146]*See* Severance, Greene, and Loftus, *Toward Criminal Jury Instructions That Juries Can Understand*, 75 J. Crim. Law and Criminology 198 (1984); Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 Cal. L. Rev. 731 (1981). *See also* Strom and Buchanan, *Jury Confusion: A Threat to Justice*, 59 Judicature (1976). Research with Florida standard jury instructions indicated that only "50 percent of the instructed jurors understood that the defendant did not have to present any evidence of his innocence, and that the state had to establish his guilt, with evidence, beyond a reasonable doubt." *Id.* at 481.

[147]Former Chief Trial Judge and GCM trial judge in Frankfurt, FRG, and Fort Bliss, Texas (now retired).

[148]The Army Trial Judiciary expects to have the Benchbook on Enable software and available for military judges in 1989. While Army judges are not currently using computer-generated instructions, the potential will soon exist for widespread use of this procedure.

[149]The counter-argument is that court members may emphasize portions of the instructions favoring one side and that the better approach is to have the members request additional oral instructions from the military judge. R. McBride, The Art of Instructing the Jury 278 (1969 & Supp. 1978). The risk of faulty memory or failure to request additional instructions remains. Providing key instructions to the members in writing helps ensure an informed court and increases the probability that the members will comprehend and remember instructions and allows easy access to them anytime clarification is "needed." Elwork, Sales & Affini, Making Jury Instructions Understandable 20 (1982).

to be given in writing, especially specific instructions that may be lengthy or confusing for a lay member.[150] While providing written instructions would have been difficult in the past, the current capabilities for word processing and copying should assist in making the delivery of written instructions a more common practice and advocacy consideration.

Counsel must also ensure that all instructions are given on the record, even if the communication between the military judge and court members is in response to a question and is brief. Such additional or clarifying instructions often raise appellate issues of prejudice or result in waiver due to failure to object.[151]

VII. INSTRUCTIONS ON SENTENCING

After counsel have presented their case on the merits and if the members have returned findings of guilty, the trial proceeds to the sentencing phase. After sentencing evidence is presented, the military judge normally calls for another article 39a session to discuss sentencing instructions. Counsel can again object to the instructions the military judge indicates will be given, or they can propose new or different instructions.[152]

R.C.M. 1005 requires the military judge to instruct on four areas:

1) maximum punishment;

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[150]Psycholinguistic experiments have indicated the "jurors, simply cannot remember, let alone master, instructions after having heard them only once. In addition, there is evidence indicating that juries that have been given a copy of the instructions perform more efficiently, engage in more informed deliberations, and feel more confident about their decisions." Schwarzer, *supra* note 146, at 756; *See also* Note, *The Availability of Written Instructions to the Jury in Indiana*, 33 Ind. L.J. 96 (1957). "In many cases the sheer volume of instructions makes it inconceivable that jurors can remember more than isolated fragments of the whole." *Id.* at 106.

[151]United States v. Higerd, 26 M.J. 848, 852 (A.C.M.R. 1988). What should counsel do if the military judge through facial gestures or tone of voice delivers the instructions in a manner unfavorable to their case? Because the record will not reveal such subtleties, counsel must raise the issue or face waiver. This issue is a delicate one that counsel will want to raise at a sidebar or article 39(a) session.

[152]R.C.M. 1005(c) states:

> Requests for instructions. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

2) procedures for deliberation and voting;

3) that members "are solely responsible for selecting an appropriate sentence and may not rely on mitigating action by the convening or higher authority;" and

4) members should consider all matters in extenuation, mitigation, and aggravation.[153]

These are the only required sentencing instructions, but many additional sentencing issues and instructions may be of interest to the trial advocate.

A. PUNISHMENTS

The area of punishments provides a number of issues for counsel to consider. The most significant issues are multiplicity, punishments other than the maximum, discharges and benefits lost, and equivalent punishments.

1. Multiplicity

Multiplicity is an issue raised in most cases. The military judge must make a determination as to which charges and specifications are multiplicious for sentencing and must instruct the members accordingly.[154] This is another advocacy opportunity because of the nature of the tests in this area. For example, consider a larceny case involving an automated teller machine (ATM) in which the accused stole another soldier's card and then used the card to make several withdrawals from the machine over the next few days. Defense counsel will want to argue the "single impulse" theory to the military judge in an attempt to have all the offenses treated as one for sentencing and to limit the maximum punishment.[155] Defense counsel also can argue that the sentence should properly reflect the true criminal actions of the accused and thus may want to argue the "insistent flow of events test" to his best advantage.[156] Using this theory, trial counsel will want to argue facts to the military judge showing that the accused had an opportunity to reconsider his criminal actions after each successive larceny. As such the acts were not continuous or of a single impulse, and they thus deserve separate punishment.[157]

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[153]R.C.M. 1005(e) *see also* Benchbook, para. 2-37.

[154]*See* Benchbook, para. 2-37.

[155]*See, e.g.*, United States v. Straughan, 19 M.J. 991 (A.C.M.R. 1984). *See also*, Novotne, *Automatic Teller Fraud and Multiplicity*, The Army Lawyer, July 1985, at 46.

[156]*See, e.g.*, United States v. Fairley, 27 M.J. 582. (A.F.C.M.R. 1988); United States v. Jobes, 20 M.J. 506 (A.F.C.M.R.), *pet. denied*, 21 M.J. 102 (C.M.A. 1985).

[157]United States v. Abendschein, 19 M.J. 619 (A.C.M.R. 1984).

This area provides a great advocacy opportunity for defense counsel, especially because some military judges may tend to find offenses multiplicious in a close case to avoid an unnecessary appellate issue. There are cases on point covering a multitude of multiplicity situations.[158] Defense counsel should have such cases available to cite to the military judge in support of their position.

The greatest concern about punishment is at a general court-martial. Defense counsel, however, will want to ensure that the members are instructed on multiplicious charges even at a special court-martial where any one offense would meet the six month maximum punishment. The reason is that multiplicity not only affects the maximum punishment, but also it may affect the way the members view the offense—as two or more separate offenses or only one.[159] More importantly, if the military judge fails to rule correctly the appellate courts may provide relief.

2. Punishments Other Than the Maximum

While the military judge must instruct the members on the maximum punishment,[160] the normal practice is to give only the total maximum punishment[161] plus the sentence worksheet. The military judge has no sua sponte duty to list every possible punishment, such as reprimand, restriction, or hard labor without confinement. Defense counsel may find it tactically advantageous, however, to request instructions on additional punishments. If requested, the military judge should normally accede to the request.[162] If counsel intends to argue

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[158]Dep't of Army, Pam. 27-173, Trial Procedure, para. 7-6 (15 Feb. 1987); Ryan, *Multiplicity Update*, The Army Lawyer, July 1987, at 29.

[159]United States v. Hauptman, SPCM 15006 (A.C.M.R. 14 Jan. 1981) (unpub.)

[160] R.C.M. 1005(e) (1). In United States v. Guervara, 26 M.J. 779, 782 (A.F.C.M.R. 1988), the court reaffirmed that the "military judge bears the ultimate responsibility for instructing the members concerning the correct maximum punishment whether an issue is raised by counsel or not." *See* United States v. Baker, 14 M.J. 361, 368 (C.M.A. 1983). Yet counsel may waive instructions on sentencing for other than plain error. *Guervara*, 26 M.J. at 782. *See also* United States v. Everstone, 26 M.J. 795 (A.F.C.M.R. 1988) (failure to raise sentence multiplicity before the trial judge waives the issue in the absence of plain error).

[161]For example, reduction, forfeiture of pay, confinement, and punitive discharge. *See also* United States v. Gutererrez, 8 M.J. 865 (N.C.M.R. 1980), *aff'd*, 11 M.J. 122 (C.M.A. 1981) (not error to give separate maximums (so long as the total is also given), but affirmed N.C.M.R. decision mandating a single maximum instruction).

[162]United States v. Henderson, 11 M.J. 395 (C.M.A. 1981) (If counsel requests instruction on other possible punishments, the "military judge will usually err if he denies such a request."). *Accord* United States v. Brandolini, 13 M.J. 163 (C.M.A. 1982). But the military judge need only instruct on permissable punishments. *See* United States v. Miller, 17 M.J. 817 (A.C.M.R.), *pet. denied*, 18 M.J. 130 (C.M.A. 1984) (military judge is not required to instruct that correctional custody is an authorized punishment,

for a specific lesser punishment, it may be helpful to have the military judge mention this potential punishment to the members so counsel can build on or refer to the instruction during argument.[163]

Other punishment instruction issues include the "escalator" clause and mandatory reduction. In any case in which an "escalator" clause is used, authorizing a punitive discharge solely because of prior convictions or multiple offenses with a total maximum punishment of six months or more,[164] trial counsel should ensure the military judge gives the required additional instruction advising the members how to determine the maximum punishment.[165] Trial counsel should also ensure the military judge instructs the members that any sentence of an enlisted person in a pay grade above E-1 which includes either a dishonorable discharge, a bad-conduct discharge, confinement, or hard labor without confinement automatically results in reduction of that individual to the lowest enlisted pay grade by operation of law.[166] Finally, any instruction given on punishments must be cor-

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because it is not); United States v. Goetz, 17 M.J. 744 (A.C.M.R. 1983), *pet. denied*, 18 M.J. 429 (C.M.A. 1984) (error for military judge to advise members that while they could not give a general discharge, they could recommend that the convening authority change the punitive discharge to a general discharge).

[162]United States v. Henderson, 11 M.J. 395 (C.M.A. 1981) (If counsel requests instruction on other possible punishments, the "military judge will usually err if he denies such a request."). *Accord* United States v. Brandolini, 13 M.J. 163 (C.M.A. 1982). But the military judge need only instruct on permissable punishments. *See* United States v. Miller, 17 M.J. 817 (A.C.M.R.), *pet. denied*, 18 M.J. 130 (C.M.A. 1984) (military judge is not required to instruct that correctional custody is an authorized punishment, because it is not); United States v. Goetz, 17 M.J. 744 (A.C.M.R. 1983), *pet. denied*, 18 M.J. 429 (C.M.A. 1984) (error for military judge to advise members that while they could not give a general discharge, they could recommend that the convening authority change the punitive discharge to a general discharge).

[163]R.C.M. 1005(b) provides that instructions on sentence shall be given after arguments. Another advocacy opportunity is presented by counsel requesting that instructions be given prior to arguments. *See* discussion *supra* under part VI, Delivery of Instructions.

[164]Benchbook, para. 2-37, at 2-42 n.3. Trial counsel should also consider the possibility of a fine in the case. If a fine is appropriate, this can be a very effective punishment. While the amount of the fine is limited to the amount of forfeiture that can be adjudged in a special courts-martial, there is no similar restriction on a general court-martial. This punishment not only makes the accused liable for payment of the fine, but the standard instructions also advise the members that they may "adjudge a period of confinement to be served in the event the fine is not paid." Benchbook, para 2-37. This additional confinement, however, may not exceed the jurisdictional limit of the court or the maximum confinement for the offense. R.C.M. 1003(b) (3).

[165]United States v. Timmons, 13 M.J. 431 (C.M.A. 1982).

[166]*See* UCMJ art. 58(a); Benchbook, para. 2-37. at 2-42.

rect and must not place "an improper restriction upon the members' discretion to select an appropriate punishment."[167]

3. Discharges and Benefits Lost

Occasionally at trial, members will ask questions concerning the effect of punishments. For example, a member may ask, "What is the effect of a bad conduct discharge on benefits?"[168] The question is a reasonable question for the member who is about to decide on a sentence. The problem is that administrative agencies have discretion in awarding benefits and the policies and programs of these agencies are subject to change. Trial counsel may want to oppose any defense request to attempt to define lost benefits or to get the military judge to tell the members that a punitive discharge "will clearly" affect the accused's future legal rights, economic opportunities, or social acceptability.[169] Trial counsel will want to offer an instruction to the military judge which essentially states: "Due to the uncertainty of what happens administratively in other agencies, it is best

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[167]United States v. Myers, 25 M.J. 573 (A.F.C.M.R. 1987), *pet. denied*, 27 M.J. 20 (C.M.A. 1988). The military judge in *Myers* erroneously instructed that the members in this general court-martial could not adjudge forfeitures in excess of two-thirds of the accused's pay. The Air Force Court of Military Review, citing an unpublished opinion, stated: "By no stretch of the imagination is a military judge required to tailor sentencing instructions, or omit instructions he might otherwise give, solely to provide an accused a greater opportunity to improve on a particular negotiated sentence limitation." United States v. Cook, ACM 26002 (A.F.C.M.R. 13 Aug 1987) (unpublished opinion).

Nor may the military judge instruct during sentencing proceedings on command policy concerning punishment. United States v. Walk, 26 M.J. 665 (A.F.C.M.R. 1987) (plain error and not waived by the failure of defense counsel to object).

[168]United States v. Givens, 11 M.J. 694 (N.M.C.M.R. 1981) (en banc). The court members in this case asked the military judge what benefits the accused would lose. The court said the military judge should not get involved with this collateral matter. *See also* United States v. Brown, 1 M.J. 465 (C.M.A. 1976) (income tax consequences of a fine as opposed to forfeiture was a collateral matter).

Counsel are sometimes upset when the court awards one punitive discharge, rather than the other. The distinction may not be as great as some counsel fear. To place this issue in perspective, counsel should read Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 Mil. L. Rev. 1 (1978).

[169]United States v. Soriano, 20 M.J. 337 (C.M.A. 1985) (harmless error to instruct the members that a punitive discharge "may" affect the accused's future legal rights, economic opportunities, and social acceptability, as opposed to "will clearly" affect). *See* United States v. Harris, 26 M.J. 729 (A.C.M.R. 1988) (correct instruction states that a bad-conduct discharge or a dishonorable discharge deprives an accused of "substantially all" benefits administered by the Veterans Administration and the Army establishment). *See also* United States v. Lenard, 27 M.J. 739, 740 (A.C.M.R. 1988) (Benchbook instruction not required to be given where accused "had already qualified for most Veterans' benefits based on a prior period of service").

that you not be instructed with specificity because the chances of your being misled are high."[170]

The test in such cases is whether the instruction is prejudicially erroneous.[171] For example, in *United States v. Griffin*[172] the court members asked the military judge several questions to include whether the accused would forfeit all retirement benefits if he received a punitive discharge. The military judge instructed the members as follows: "An enlisted member who is retirement eligible at the time of sentencing and who is reduced in grade but not sentenced to a punitive discharge will, if permitted to retire, retire at the grade to which reduced but will be paid at the higher grade."[173] The court noted that the military judge also instructed the members that "decisions concerning appellant's retirement status would be made by the Secretary of the Air Force; the members should sentence appellant based on the offense committed and the instructions given; and the members could recommend that the convening authority grant appellant clemency."[174]

The Court of Military Appeals in *Griffin* stated that they saw no need to modify the general rule that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."[175]

In a concurring opinion Chief Judge Everett noted that while it is permissible to instruct on collateral consequences of sentencing alternatives, such consequences "cannot always be foreseen."[176] Judge Everett concluded that "for practical reasons and in the exercise of sound discretion, the military judge is entitled to limit the

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[170]United States v. Givens, 11 M.J. 694 (N.M.C.M.R. 1981). The following suggested response appeared in an enclosure to the 8 Nov. 1988 Memorandum For Trial Judges from the United States Army Trial Judiciary: "There are many administrative and practical effects that may result from a conviction or a particular punishment. All effects are not predictable and it would be speculative for me to instruct you on possible collateral effects."

[171]United States v. Griffin, 25 M.J. 423 (C.M.A.), *cert. denied*, 108 S. Ct. 2849 (1988).

[172]*Id.*

[173]*Id.* at 424.

[174]*Id.*

[175]*Id.* (citing United States v. Quisenberry, 31 C.M.R. 195, 198 (C.M.A. 1962)). *See also* United States v. Murphy, 26 M.J. 454 (C.M.A. 1988).

[176]*Griffin*, 25 M.J. at 425.

scope of the advice he provides."[177] But defense counsel should request such an instruction if it will "educate" the members as to the far-reaching effects of a sentence and thus help reduce the sentence to be returned by the members.

4. Equivalent Punishments

Another question members may ask concerns equivalent punishments, such as whether a bad-conduct discharge is equivalent to six months of confinement. The military judge will be reluctant to instruct here because it is not easy to compare sentences or to establish equivalents.[178] Normally the military judge will only provide the standard *Benchbook* instruction, which places responsibility on the members to determine which proposed sentence is the least severe and to decide any differences among the members by majority vote.[179] The military judge may instruct in this area when there is no dispute, such as advising the members that a dishonorable discharge is more severe than a bad-conduct discharge.[180]

If counsel can obtain their opponent's agreement to a comparison of punishments, such as a dishonorable discharge and twelve months' confinement being more severe than a bad-conduct discharge and fourteen months' confinement, the military judge may give the instruction. This seemingly obscure issue may become very important to counsel because the members are instructed to vote on sentences beginning with the least severe.

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[177]*Id. See also* United States v. Murphy, 26 M.J. 454 (C.M.A. 1988) ("[A]n accused should be sentenced without regard for the collateral administrative consequences of the sentence in question."). *But see* United States v. Hopkins, 25 M.J. 671, 673 (A.F.C.M.R. 1987), *pet. denied*, 26 M.J. 212 (C.M.A. 1988) (The instruction given by the military judge on the effect of a bad-conduct discharge was more accurate than the Benchbook's because "there is a distinct difference in the effect of a bad conduct discharge when it is awarded in a special court-martial from when it is adjudged in a general court-martial.").

[178]United States v. Cavalier, 17 M.J. 573 (A.F.C.M.R. 1983), *pet. denied*, 17 M.J. 433 (C.M.A. 1984). "It is an area not susceptible to a neat table of equivalency." *See also* United States v. Onart, 26 M.J. 315 (C.M.A. 1988) (instruction of the military judge that monetary penalties were more severe than confinement was error).

[179]Benchbook, para. 2-53.

[180]United States v. Holland, 19 M.J. 883 (A.C.M.R. 1985). The military judge properly denied the request to instruct that a BCD was equivalent to one year of confinement. While not "all comments on the relative severity of punishments are improper," they cannot "violate the mandate for individualized sentencing." *Id.* at 885.

B. EXTENUATION, MITIGATION, AND AGGRAVATION

Instructions in extenuation, mitigation, and aggravation also present advocacy opportunities. The most important advocacy opportunities are in the area of tailoring, pretrial restraint, and the accused's mendacity.

1. Tailoring

The accused has just been convicted of murder. During the merits the accused presented evidence of provocation by the victim. Even if the evidence was insufficient to reduce the offense to voluntary manslaughter, defense counsel may want to request an instruction on the prior evidence of provocation for sentencing purposes. The Court of Military Appeals has held such an instruction request was proper, despite the argument that this would almost be "an invitation to reconsider the original findings of guilty."[181] Likewise, where drunkenness in a case may not negate the required specific intent for an offense, an instruction from the military judge that the members may properly consider it as a matter in extenuation and mitigation may assist defense counsel in his plea for a lenient punishment.[182]

2. Effect of a Guilty Plea

Whenever the accused pleads guilty to an offense, defense counsel will want the military judge to give the instruction that informs the members that a plea of guilty must be considered along with the other facts and circumstances in the case, and that "[t]ime, effort, and expense to the government (usually are) (have been) saved by a plea of guilty. Such a plea may be the first step toward rehabilitation."[183] These words from the military judge can have a very salutary impact on the sentencing body and should not be overlooked by defense counsel.

Trial counsel, however, should consider two twists to this standard instruction. First of all, this instruction need not be given in each case in which the accused pleads guilty. For example, in *United States*

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[181]United States v. Wilson, 26 M.J. 10, 14 (C.M.A. 1988).

[182]United States v. Cook, 29 C.M.R. 395 (C.M.A. 1960); United States v. Smith, 25 M.J. 785 (A.C.M.R.), *pet. denied*, 27 M.J. 18 (C.M.A. 1988) (military judge should have tailored instructions to include intoxication as a matter in mitigation).

[183]Benchbook, para. 2-37.

v. Williams[184] the accused changed his plea to guilty only after the government presented its final witness and after his son recanted his previous testimony concerning his father's innocence of the charge of indecent acts. Absent a defense request the military judge did not instruct the members that the guilty pleas were a mitigating factor. The military judge's decision was upheld because the "court members themselves had to decide for themselves how to consider this late change of pleas."[185] The court stated the members needed no specific instruction here where the plea was made only as the result of "overwhelming evidence of guilt."[186] Likewise, if the accused's conduct has not saved the government time, effort, and expense, trial counsel will want to argue that the military judge should not give that portion of the standard instruction.

3. Pretrial Restraint

Counsel will also want to consider instructions concerning pretrial restraint. The military judge normally will indicate any pretrial restraint as a matter in mitigation.[187] Trial counsel must consider the various types of credit that can form the basis for instructions in this area: *Allen* credit for any pretrial confinement;[188] *Suzuki* or article 13 credit for any illegal conditions of confinement;[189] R.C.M. 305 credit for violations of procedural rules;[190] as well as *Mason* credit for other forms of restraint tantamount to pretrial confinement.[191] Trial counsel should request an instruction that covers all credits that apply to a particular case.[192] These instructions are given to let the members determine an appropriate sentence, knowing not only that the accused has been under pretrial restraint, but also that he will receive sentence credit. Trial counsel will want to ensure the instruction is given, and defense counsel generally should object to the instruction on credits as in some cases the members may give a more

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[184]26 M.J. 644 (A.C.M.R. 1988).

[185]*Id.* at 649.

[186]*Id.*

[187]Benchbook, para. 2-37. *See* United States v. Davidson, 14 M.J. 81 (C.M.A. 1982) (sentence set aside where military judge gave a general instruction on extenuation and mitigation and did not mention the accused's pretrial confinement); United States v. Vasques, 9 M.J. 517 (A.F.C.M.R. 1980).

[188]United States v. Allen, 17 M.J. 126 (C.M.A. 1984); R.C.M. 305(k).

[189]United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983).

[190]R.C.M. 305.

[191]United States v. Mason, 19 M.J. 274 (C.M.A. 1985) (summary disp.).

[192]*See, e.g.*, United States v. Gregory, 21 M.J. 952 (A.C.M.R.), *aff'd*, 23 M.J. 246 (C.M.A. 1986) (credit under both R.C.M. 305 and *Allen* granted for restriction tantamount to confinement when R.C.M. 305 procedures were not followed).

severe sentence to offset any credit and to ensure the accused serves an appropriate period of confinement.

4. Mendacious Accused

Some accused will lie at trial. While all defense counsel know that this is unquestionably a rare phenomenon, if it does occur trial counsel will most assuredly wish to argue this fact to the members. If trial counsel argues the accused lied to the members, the military judge should give the "mendacious accused" instruction, which limits how the members may consider the accused's mendacity.[193] The instruction advises the members that they may consider the mendacity only upon finding:

1) the accused lied under oath;

2) the lies were willful and material; and

3) finally, that they may consider any lies only as they conclude the lies bear upon the accused's rehabilitative potential, and they may not mete out additional punishment just because the accused lied.

Defense counsel must decide whether they want the instruction or wish to object to the instruction. Even if defense counsel objects, the military judge can still give the instruction because, at least in theory, it favors the defense by limiting the use of this evidence by the members.[194] Nonetheless, defense counsel may wish to waive the instruction out of concern that the members will once again be reminded that the accused lied to them under oath.

VIII. ARGUMENT

What are the advocacy considerations for counsel during or after arguments? Yes, the military judge has a sua sponte duty to stop an improper argument and to give a curative instruction.[195] Does that

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[193]United States v. Warren, 13 M.J. 278 (C.M.A. 1982); United States v. Cabebe, 13 M.J. 303 (C.M.A. 1932); Benchbook, para. 2-60. *But see* United States v. Smith, 25 M.J. 785 (A.C.M.R.), *pet denied*, 27 M.J. 18 (C.M.A. 1988) (mendacious accused instruction not required where accused made unsworn statement and did not falsely testify under oath before the members).

[194]United States v. Ryan, 21 M.J. 627 (A.C.M.R. 1985), *pet. denied*, 27 M.J. 18 (C.M.A. 1988); United States v. Fischer, 17 M.J. 768 (A.F.C.M.R. 1983), *rev'd on other grounds*, 24 M.J. 358 (C.M.A. 1987) (military judge did not abuse his discretion where he gave the *Warren* instruction over defense objection).

[195]United States v. Horn, 9 M.J. 429 (C.M.A. 1980). *See also* United States v. Geidl, 10 M.J. 168 (C.M.A. 1981) (trial counsel argued on the "borderline of impropriety" and the military judge gave an excellent curative instruction).

mean counsel have no role in policing improper argument? No. Counsel must be actively involved when opposing counsel engage in improper argument. If counsel perceive that opposing counsel has exceeded the bounds of propriety, they must seize the advantage. After a proper objection, the military judge will often simply instruct the members of the court that arguments of counsel are not evidence and that they must decide the issues in the case on the facts as they remember them. Counsel should seek a more specific instruction. If counsel can obtain a curative instruction advising the members that opposing counsel has argued facts not in evidence and instructing the members to disregard that portion of the argument, the members may discard the whole of the opponent's final advocacy effort.

IX. WAIVER

Defense counsel must be keenly aware that the last subparagraphs of both R.C.M. 920 and 1005 contain language stating that failure to object to the military judge's instructions will constitute waiver in the absence of plain error. Inattentive counsel may find that no relief will be granted on appeal where there has been no objection to an instruction at trial. The courts are finding fewer instructional errors to constitute plain error.

Prior to *United States v. Fisher*[196] failure to instruct on voting beginning with the lightest sentence had been considered plain error.[197] *Fisher* held that failure to request an instruction or to object to a given instruction constitutes waiver in the absence of plain error.[198] The military reporters are filled with lessons for defense counsel where the lack of timely and aggressive objections have led to affirmance of the conviction.

X. CONCLUSION

The themes linking the previous discussion on instructions have emphasized counsel preparation and timely objection to avoid waiver. Counsel have many priorities in preparing for trial. Instructions should not be relegated solely to the military judge or treated as an

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[196]21 M.J. 327 (C.M.A. 1986).

[197]*See, e.g.*, United States v. Lumm, 1 M.J. 35 (C.M.A. 1975); United States v. Johnson, 40 C.M.R. 148 (C.M.A. 1969).

[198]*Fisher*, 21 M.J. 327. *See also* United States v. Williams, 26 M.J. 644 (A.C.M.R. 1988) (failure to request instruction that the court members may not rely on possible mitigating action by the convening authority constituted waiver).

afterthought. Trial advocates traditionally are told to begin trial preparation with the closing argument. The trial advocate's first consideration, however, must be instructions, not only to properly outline the closing argument, but also to maintain a theory of the case through voir dire, the opening statement, presentation of evidence, and argument that will be consistent with the final charge that the military judge will give to the court members.[199] Research has indicated that a large proportion of jurors do not understand instructions and often do not follow them.[200] This should provide an even greater incentive for counsel to ensure that what is provided to the court members is correct and most beneficial to the case. While instructions may not be the foremost advocacy concern of counsel, the importance of instructions to a case cannot be underestimated, as they may make the difference in the result of the case.

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[199]Becker, *Instructions*, 27 A.F. L. Rev. 197 (1987).

[200]Schwarzer, *Communicating With Juries: Problems and Remedies*, 69 Cal. L. Rev. 731 (1981).

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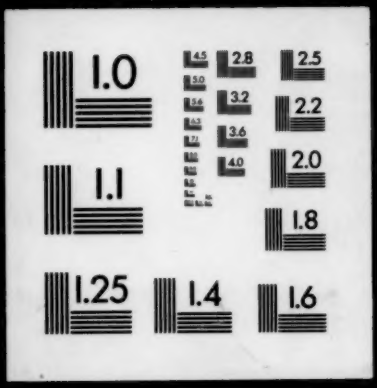
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